No. 73-841

Cale J. Holder, United States District Judge for the Southern District of Indiana,

Petitioner,

v.

Arthur Banks

Apr. 15, 1974 - Motion of petitioner to dispense with printing appendix and to proceed on original record granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

73-841

HON. CALE J. HOLDER,
United States District Judge for the Southern District of Indiana,
Petitioner,

v.

ARTHUR BANKS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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HON. CALE J. HOLDER,
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ARTHUR BANKS,
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PETITION FOR WRIT OF CERTIORARI

Petitioner, the Hon. Cale J. Holder, Judge of the United States District Court for the Southern District of Indiana, respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals to review the decision of that Court in an original action for mandamus captioned Arthur Banks v. Hon. Cale J. Holder, Cause No. 73-1332.

JURISDICTION

The Court of Appeals rendered its original decision on May 17, 1973 (Exhibit A) and thereafter on Oct. 1, 1973, by a vote of four to three, denied a petition for rehearing. (Exhibit B). Neither decision is yet reported. On

Oct. 5, 1973 Mr. Justice Rehnquist stayed the enforcement and effectiveness of the decision of the Court of Appeals. On Oct. 26, 1973 Mr. Justice Rehnquist granted petitioner an extension of time within which to file a petition for writ of certiorari to and including November 29, 1973. This Court has jurisdiction to review the decisions of the Court of Appeals pursuant to Title 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. The scope of a trial court's discretionary power to deny a criminal defendant's request that he be represented *pro hac vice* by an attorney not a member of that Court's bar and in particular

   (a) whether an attorney's violation of the rules of the Court and of the ethical standards of the legal profession warrants denial of the request, and

   (b) whether such a denial is forbidden by the Sixth Amendment to the United States Constitution.

2. (a) whether the court rules and ethical standards which forbid an attorney in a criminal case from making extrajudicial statements on specific subjects for public dissemination are compatible with the First Amendment to the United States Constitution.

   (b) whether an attorney's deliberate incitation of sympathizers to demonstrate and pack the courtroom was protected by the First Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS, COURT RULES AND ETHICAL STANDARDS INVOLVED

Amendment I to the United States Constitution:

> "Religious and political freedom.—Congress shall make no law . . . abridging the freedom of speech. . ."

Amendment 6 to the United States Constitution:

> "Rights of the accused. In all criminal prosecutions the accused shall enjoy the right to a speedy and pub-

lic trial by an impartial jury of the state and district wherein the crime shall have been committed . . . and to have the assistance of counsel for his defense."

Rules of the United States District Court for the Southern District of Indiana:

Rule1(f). "The Canons of Ethics of the American Bar Association as from time to time existing shall be the standards of conduct for members of the Sourthern Indiana District Bar."

Rule 27. "It is the duty of the lawyer not to release or authorize the releasc of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice."

"From the time of arrest, issuance of an arrest warrant or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement for dissemination by any means of public communication, relating to that matter and concerning:

"(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

"(2) the existence of contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

"(3) the performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

"(4) the identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

"(5) the possibility of a plea of guilty to the offense charge or a lesser offense;

"(6) any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case."

American Bar Association's Code of Professional Responsibility and Canons of Judicial Ethics:

DR 1-102(A). "A lawyer shall not . . . (5) Engage in conduct that is prejudicial to the administration of justice."

EC 7-33. "A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an imparital tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established."

EC 7-36. "Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and

above-board in his relations with a judge or hearing officer before whom he appears.

DR 7-107. "(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

"(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

"(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

"(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

"(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

"(5) The identity, testimony, or credibility of a prospective witness.

"(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case."

STATEMENT OF THE CASE

This case commenced with the return of an indictment against respondent in the United States District Court for the Southern District of Indiana on December 14, 1972. Respondent, an inmate of the federal penitentiary at Terre Haute, Indiana, was charged with assaulting a guard at that institution. At the first arraignment held on December 20, 1972, respondent appeared and indicated that his counsel would be William M. Kunstler, having been engaged approximately one month previously. Because of Mr. Kunstler's absence at that hearing, the arraignment

was continued at respondent's request. On January 2, 1973, another arraignment was attempted, but because of Mr. Kunstler's absence, the arraignment was continued again at respondent's request. On February 2, 1973, the respondent again came before the court for arraignment, but again Mr. Kunstler did not appear. The court then entered a plea of not guilty for respondent. On March 21, 1973, Mr. Kunstler filed an application for leave to appear on behalf of respondent. In response to a request by the government for a hearing on the application, petitioner held a hearing on April 1, 1973. At that hearing it was shown that Mr. Kunstler had on various occasions since February 9, 1973 (the date on which Mr. Kunstler states he became counsel for respondent) made in Terre Haute or Indianapolis the following statements to public audiences or to the news media concerning the pending criminal case:

(1) "that it was his client Banks who was assaulted by the prison guards;

(2) "that the charge against Banks is purely retaliative . . . a cheap little way of getting back at him for being a trouble-maker;

(3) "that Mr. Kunstler was certain he (Banks) was brutalized by the guards;

(4) "that it is a common cover-up tactic in order to protect the guards to file charges against Banks;

(5) "that all the evidence is inside the prison walls, under the control of the authorities who brought the charges against Banks;

(6) "the word of a guard is always taken over that of an inmate;

(7) "that Banks got into all this trouble because he doesn't act like most of the black inmates who 'Uncle Tom' it inside;

(8) "that there is a lot of antagonism against Banks because his wife is white;

(9) "that Attorney Kunstler urged students at Terre Haute to organize demonstrations in support of Banks and to fill the courtroom with sympathetic spectators during the trial;

(10) "That 'Anything they can do to call attention to the trial will be welcomed. I am not asking them to blow up the courthouse but that would certainly draw attention.'

(11) "that Mr. Kunstler was quoted as being proud to be associated with Mr. Banks as he represents the finest of the pacifist anti-war movement;

(12) "that Mr. Banks is a black man who was sent to jail for his beliefs in the value of human life and the dignity of all people at a time when many who have much more to defend chose alternatives to incarceration;

(13) "that Mr. Kunstler sees this indictment as a political attack by the prison administration on an individual who firmly stands for his beliefs, who is articulate and a spokesman for "Black Liberation and Pacificism," and therefore a threat to the smooth-running oppression that is so much a part of prison life in this country today;

(14) "that Mr. Kunstler is quoted as saying, 'This case typifies the strategy used to quiet dissent among inmates, for the case is such that due process is virtually an impossibility.'

(15) "The moment he [Banks] went into prison he was doomed.' "

(16) " 'the only successful way to defend your self against charges such as those against Banks is by creating a a [*sic*] complete support group around the trial, that includes demonstrations and making sure every court session has a full house and listing celebrities who are interested in the case . . . and Kuntsler [*sic*] had a comment concerning draft evaders and the granting of amnesty. . . .' "

Mr. Kunstler did not dispute these statements and expressed his right to make them and an intention to con-

tinue. Petitioner concluded that such public statements violated the rules of court and ethical standards of the legal profession concerning pretrial publicity, that such violations and Mr. Kunstler's indication that he would continue threatened a trial fair to both defendant and the public and the orderly administration of justice and on that basis together with a concern for Mr. Kunstler's delays in appearing for respondent denied Mr. Kunstler leave to appear. Opinion attached as Exhibit C. Thereafter, respondent brought the original action for mandamus in the Circuit Court of Appeals for the Seventh Circuit. While that action was pending Mr. Kunstler kept his promise to make more public statements concerning the case. At a promoted speech at the Indiana University Law School in Indianapolis Mr. Kunstler made the following statements:

> "* * * I was denied in two other states the right to represent defendants in criminal cases; * * * The other was in the Circuit Court in Dade County, Florida, in Miami, where a judge by the name of Murray Goodman refused to let me represent a young man named Alton Forbes, who is one of the defendants in the Vietnam Veterans Against the War conspiracy case to disrupt the Republican National Convention which will be starting in . . . very shortly. Some of you may have read that Judge Murray Goodman was indicted two weeks ago with the Mayor of Miami Beach for accepting bribes. . . . I don't raise that as the background of every one of the judges, though it wouldn't totally surprise me if that was the case, but I indicate that it is rather interesting that those who preach the righteous gospel so vigorously like Judge Murray Goodman and Al Capp to name two, are so frequently caught in the most horrendous of situations. Those of you who, that aren't familiar with Al Capp might be reminded that he just pleaded guilty to attempting to force young women to commit what the law so euphemistically describes as an act against nature . . . at a motel in Eau Claire, Wisconsin. That is another matter.

". . . On a personal level I was deeply shocked by it because it [the pending case involving respondent Banks] was the first time in any federal case that I ever heard a United States District Judge deny an attorney the right to represent the person who desires his services. It was done in a cold and crass and criminal manner by a judge [Holder] who, in doing so, committed a crime. He violated the civil rights of a defendant. Under any ordinary set of circumstances, if the law was just and honest, he should be indicted for what he did. He violated his oath of office; he violated his oath as a member of his profession, and he violated every tenet of human decency in doing it. * * * "

"Write a letter to the judge, write a letter to the newspapers. Picket the courthouse, do anything that will contribute to the issue."

"There is a committee here for Arthur Banks and anyone that wants any information about that can reach that committee through the law offices of Barnhart and Allison."

Following the speech a taped interview was held with an Indianapolis radio station during which Mr. Kunstler made the following comments:

"* * * The Judge here, Judge Holder, has said that he is not going to permit me to appear in his Court, which means that I can't represent Arthur Banks, which means that I am disbarred as far as this Court is concerned, and he is doing it for no good reason whatsoever, other than his own innate prejudice against me. * * *"

". . . it would seem to me any lawyer worth his or her salt would be writing to the Editor, writing to the Bar Association, writing to the Judge, writing to the Court of Appeals for the Seventh Circuit, and saying, 'Look here, we may or may not agree with William M. Kunstler, but that is not the issue before us. The issue is, are we going to rape the Constitution by allowing a Federal Judge to do what the Constitution says he should never do, and that's to deprive a defendant of his right to an attorney of his choice.' "

"I don't think anyone should respect the law, not certainly as it's practiced in America."

"* * * It [the law] is neither fair nor just, because it's manipulated and utilized. . . . And in its own procedures and practices it's unfair as well; built in, deliberately, I think, into the system. I think the best use is to distrust it, strip it of all its mysticism; to demonstrate, to fill courtrooms, to confront it. * * * We would think nothing peculiar at all about picketing Congress or picketing the White House—why not picketing the Court? * * *

"I think that the only answer in all of these systems, is confrontation. Physical confrontation. * * *"

While the mandamus action below was being considered on a petition for rehearing, and during which the court had issued a stay of its original order, the effect of such stay being to deny Mr. Kunstler the right to represent respondent, Mr. Kunstler nevertheless attempted to initiate a habeas corpus action on behalf of respondent. That suit was asigned to the Hon. S. Hugh Dillin, another judge of the United States District Court for the Southern District of Indiana. Judge Dillin noted that the petition was not signed by respondent but only by Mr. Kunstler. Judge Dillin, noting other defects in the petition and being apprised of the pending proceedings in the Court of Appeals, concluded that the petition was nothing more than a sham proceeding by Mr. Kunstler to get the district court to recognize him as counsel for the respondent. See opinion attached as Exhibit D. Then on October 6, 1973, after Mr. Justice Rhenquist had granted a stay of the Court of Appeals' decision, the effect of such stay again being to deny Mr. Kunstler the right to represent respondent, Mr. Kunstler filed another mandamus action, this time against Judge Dillin. True to form Mr. Kunstler then called a press conference before an Indianapolis radio station during which he made the following statements:

"'• • • I think it's a frightful thing that has been done to him [Banks] by the Government of the United States, the American Bar Association, 21 of the so-called prestigious Indiana lawyers who filed against him, and a United States district judge by the name of Dillin, who is being sought to be impeached because of his integration decree in Indiana and while I'd oppose his impeachment on those grounds, I would wholeheartedly support it for what he has done to this black man in Terre Haute. He has violated his oath of office and he has denied this man the most fundamental of rights. He has ignored his habeas corpus. He has succeeded in stalling his case long enough for the Government to catch up with Justice Rehnquist in Washington and to put his case in limbo where it cannot move. And those who say to American citizens, trust in the system and do not adopt alternative methods, may some day remember this case along with others when people refuse to trust the system. It's about the worse instance in my career of some 25 years that I have ever seen. Judge Hoffman pales into insignificance when you compare him to Judge Dillin, because Judge Hoffman was at least honest. Judge Dillin is a fraud. And, I think he has done a [sic] enormous injustice to Arthur Banks and he probably has done it because he is trying to avoid the anger of the citizens of Indiana for his integration decree and so he has decided to destroy Arthur Banks in order to get back on the establishment's bandwagon. It's a very sad and desperate thing, I think, that a Federal judge will violate his oath of office in this fashion, but I gess [sic] it's not unexpected since the President of the United States does it regularly.

"'Well, in this case, it's an alliance between the United States government, the American Bar Association, the Indiana Bar or what they call prestigious members of the Indiana Bar and the Federal Judges in this District, Judge Holder, Judge Dillin and others. And it's a vicious cycle, one feeds into the other. It's a criminal conspiracy to subvert the Constitution. And these men like Dillin and Holder are criminals and it's just too bad that American people don't recognize who

the real criminals are in their midst. They are not in Terre Haute prison. They sit in White Houses and State Houses and they sit on benches and they destroy human beings. And I don't know what should be done to them. I have several ideas.' "

Thereafter the Court of Appeals denied the application for mandamus against Judge Dillin.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH AMENDMENT DOES NOT IMPAIR THE AUTHORITY OF A TRIAL COURT TO DENY LEAVE TO UNADMITTED COUNSEL TO APPEAR *PRO HAC VICE* BECAUSE OF CONDUCT CONTRARY TO THE COURT'S RULES AND THE ETHICAL STANDARDS OF THE PROFESSION.

The Sixth Amendment declares that an accused enjoys the right "to have the assistance of counsel for his defense." However, this right is not absolute. "The constitutional mandate is satisfied so long as the accused is afforded a fair or reasonable opportunity to obtain particular counsel, and so long as there is no *arbitrary* action prohibiting the effective use of such counsel. *The conclusion becomes inescapable, therefore, that although the right to counsel is absolute, there is no absolute right to a particular counsel.*" *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1215 (3rd Cir. 1969), *cert. denied*, 397 U.S. 946 (1970). (Emphasis supplied.)

Since the right to counsel means the right to be represented by a member of the bar, it does not extend to persons not admitted to practice or who have been excluded from practice permanently or temporarily. Thus the Sixth Amendment does not give an accused the right to select an attorney previously admitted in the jurisdiction whose right to practice has been suspended for unethical conduct,

and this would apply to exclusion for misconduct in the particular case as well as to a general suspension.

It has long been the general practice of courts to allow foreign counsel to appear *pro hac vice*.

That is far from saying, however, that a defendant has a constitutional right to be represented by foreign counsel. "It is well settled that permission to a nonresident attorney, who has not been admitted to practice in a court, to appear *pro hac vice* in a case there pending is not a right but a privilege, the granting of which is a matter of grace resting in the sound discretion of the presiding judge." *Thomas* v. *Cassidy*, 249 F.2d 91, 92 (4th Cir. 1957), *cert. denied sub nom., Fitzgerald* v. *Cassidy*, 355 U.S. 958 (1938), in which the nonresident lawyer engaged in unspecified "unlawyerlike" conduct. See also *People of the State of New York* v. *Epton*, 248 F.Supp. 276, 277 (S.D. N.Y. 1965); *In re Henry*, 40 N.Y. 560 (1869); *Manning* v. *Roanoke & T. R. Co.*, 122 N.C. 824, 28 S.E. 963 (1898); *Youmans* v. *Hanna*, 35 N.D. 479, 160 N.W. 705 (1916); *In re Pierce*, 189 Wis. 441, 207 N.W. 966 (1926).

Nevertheless, the exercise of discretion must be reasonable and not arbitrary. As a practical matter, since it is desirable to allow a defendant to be represented by an attorney of his choice, this means that a defendant's request to be represented by outside counsel, in association with local counsel, will be granted unless good cause for denial appears.

However, the question of whether a defendant has a right to a lawyer not a member of the local bar has seldom been presented in constitutional terms. Indeed, the powers of state and federal courts to require that attorneys practicing before them be admitted to their bars would be greatly impaired, both in principle and practice, if parties

had a constitutional right to be represented by any attorney admitted anywhere.

The Third Circuit, speaking through Circuit Judge Goodrich, in *Cooper* v. *Hutchinson*, 184 F.2d 119, 122 (3rd Cir. 1950), found such a proposition "startling", and observed (p. 122):

> "The argument for the appellants thus necessarily goes far beyond an insistence that a man charged with a capital crime in a state court must have the assistance of counsel. These appellants have had the service of counsel all the way through the prosecution of the charges against them. The narrower question here is the extent to which an accused person's choice of counsel is a constitutional right. The argument insists that there is a constitutional right, at least in a capital case, to whatever counsel an accused person pleases to have. If that counsel is not a member of the bar of the state where the prosecution is being conducted, still, the argument runs, the accused may effectively choose him just as freely as he could choose a lawyer admitted to practice locally. The person chosen by the accused may then insist upon conducting the defense in the local courts. Control by the states over the persons who may be licensed to practice law in their courts would thus be greatly diminished in every capital criminal prosecution where the accused desires counsel from somewhere else.
>
> "The length to which this argument takes one is startling. It has always been thought that the license to practice law is limited, except as a matter of grace, to persons who had fulfilled the local requirements for practice. The Civil Rights Act provision relied upon here is a powerful piece of legislation and its power has ben recognized by this Court. But we have never been asked to take it this far. The Bergamo case, which has been pressed upon us, is not conclusive here, for in that case we were only laying down qualifications for the trial of cases in the federal courts of this circuit."

Since outside counsel had been already admitted *pro hac vice* in the *Cooper* case, the Court found it necessary to hold only that a right thus granted, "may not, without cause, be taken away", without passing upon the "broad question" of the right of outside counsel to appear in the first instance.*

The argument that a criminal defendant has a constitutional right to an out of state attorney was recently rejected by the New Jersey Supreme Court in *State* v. *Kavanaugh*, 52 N.J. 7, 243 A.2d 225, 231 (1968), *cert. denied sub nom., Matzner* v. *New Jersey*, 393 U.S. 924 (1968), with the Third Circuit concurring:**

> "Mr. Bailey's clients urge a constitutional right to select an attorney who is not a member of our Bar. So long as the Bar of our State is able, willing and free to provide effective counsel, there is no such right. Thomas v. Cassidy, 249 F.2d 91 (4 Cir. 1957), certiorari denied, Fitzgerald v. Cassidy, 355 U.S. 958, 78 S.Ct. 544, 2 L.Ed2d 533 (1958); People of State of New York v. Epton, 248 F.Supp. 276 (S.D. N.Y. 1965); see Parker v. Parker, 97 So.2d 136 (Dist. Ct. App. Fla. 1957); Johnson v. DiGiovanni, 347 Mich. 118, 78 N.W.2d 560, 565 (Sup. Ct. 1956). This is not a situation in which no member of the local Bar will act. See Lefton v. City of Hattiesburg, Mississippi, 333 F.2d 280 (5 Cir. 1964)

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* *In United States* v. *Bergamo*, 154 F.2d 31, 33 (3rd Cir. 1946), where there was no suggestion of improper conduct on the part of the attorneys selected by the defendants, the same Circuit had said "To hold that defendants in a criminal trial may not be defended by out of the district counsel selected by them is to vitiate the guarantees of the Sixth Amendment." The constitutional basis for this dictum was repudiated in the Circuit opinion quoted in the text, written by Circuit Judge Staahl who had been a member of the panel in *Bergamo*.

** The United States District Court refused to overturn the decision of the New Jersey Supreme Court saying that it could "add nothing" to that court's "comprehensive and well reasoned decision." *Matzner* v. *Brown*, 288 F.Supp. 612 (D. N.J.), aff'd, 410 F.2d 1376 (3rd Cir. 1969), cert. denied, 396 U.S. 1015 (1970).

> There is no dearth of competent attorneys in our State ready to meet the constitutional right to counsel. There is nothing provincial about the requirement for admission to practice in the courts of a State. The courts of every jurisdiction must have control of practice before them as an 'incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct insullied.' Cohen v. Hurley, 366 U.S. 117, 123-124, 81 S.Ct. 954, 958, 6 L.Ed.2d 156, 162 (1961)."

Occasional statements that a defendant's right "to be heard through his own counsel was unqualified" (*Chandler v. Fretag*, 348 U.S. 3, 9 (1954)) and that the right to counsel of one's own choice is "absolute and no showing of special circumstances is necessary" (*Reickhauer v. Cunningham*, 299 F.2d 170, 172 (4th Cir. 1962)) were made in cases in which defendant was allowed no effective legal representation and which did not in any way involve a question of non-local counsel or the failure of selected counsel to comply with court rules or ethical standards. And there are cases, such as *Bergamo* and *Magee v. Superior Court*, 8 Cal.3d 949, 106 Cal. Rptr. 647, 506 P.2d 1023 (1973), holding that leave to appear *pro hac vice* may not be denied without good reason; neither case involved any charge of unethical conduct.*

As the *Kavanaugh* and *Rundle* cases (all *supra*) show, at least two factors have been recognized as good cause for denying retained counsel, both in and out of state, leave to appear. One is the inability of such counsel to serve without unduly delaying the trial. "Desirable as

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* In the *Magee* opinion the California court stated that the defendant's choice of retained counsel "can constitutionally be forced to yield only when it will result in significant prejudice to the defendant himself or in a *disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.*" 506 P.2d at 1025 (Emphasis supplied.).

it is that a defendant obtain private counsel of his own choice, that goal must be weighed and balanced against an equally desirable public need for the efficient and effective administration of criminal justice." *United States ex re. Carey* v. *Rundle*, 409 F.2d 1210, 1214 (3rd Cir. 1969); *United States V. Hampton*, 457 F.2d 299, 301 (7th Cir.), *cert. denied*, 409 U.S. 856 (1972); *United States* v. *Cozzi*, 354 F.2d 637, 639 (7th Cir.), *cert. denied*, 383 U.S. 911 (1966); *United States* v. *DiStephano*, 464 F.2d 845, 846 n. 1 (2d Cir., 1972); *United States* v. *Pigford*, 461 F.2d 648 (4th Cir. 1972).

The second factor is whether the outside lawyer has engaged in "unlawyerlike," unethical or illegal conduct in relation to the particular case. So far as petitioner has been able to ascertain, *every* court which has mentioned lawyers' misbehavior, whether by way of holding or dictum—and fortunately there are few such cases—has indicated that it is a legitimate ground for excluding an outside attorney from a case. Holdings: *Thomas* v. *Cassidy*, *State* v. *Kavanaugh*, *Matzner* v. *Brown*, all *supra*; *Parker* v. *Parker*, 97 So.2d 136 (Fla. Ct. of App. 1957). Dicta: *Sanders* v. *Russell*, 401 F.2d 241 (5th Cir. 1968); *Spanos* v. *Skouras Theatres Corp.*, 364 F.2d 161, 168 (2d Cir. en banc, 1966), *cert. denied*, 385 U.S. 987 (1966); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Jackson*, 235 F.2d 390, 393 (10th Cir. 1956).

Petitioner submits there is no better reason to deny a lawyer leave to appear *pro hac vice* than his refusal to abide by the rules of the court and the ethical standards of the legal profession, which in this case coincide. Particularly must this be true when the rules and standards in question are designed to insure a fair trial and when the subsequent statements and acts of the lawyer manifest an intention to continue to engage in the same kind of con-

duct. Indeed, unless the Rule, the Code and the canons are unconstitutional, this would seem to be the most compelling reason for not allowing outside counsel to appear.

In *Kavanaugh*, which also involved public statements by out-of-state counsel, the Supreme Court of New Jersey recently ordered F. Lee Bailey removed as counsel (243 A.2d at 231):

> "It is not easy for us to oust counsel of a client's choice. But the misbehavior here is so gross that we cannot risk more of it. We have searched for some evidence that Mr. Bailey would stay in bounds, but unhappily we cannot find it. There must be a fair trial, *both for a defendant and for the State*. The conduct here involved invaded that interest. But of even greater moment than the interest of the immediate parties is the interest of the public in the integrity of the judicial process. The antics here involved spill over upon the right of all litigants to expect justice in the courtroom and in accordance with the rules of law. We have weighed again and again whether that larger interest could be served by a subsequent disciplinary proceeding alone, and we are constrained to find that it would not. We must therefore affirm the order." (Emphasis supplied.)

Kavanaugh and its companion case in the federal courts (*Matzner* v. *Brown*, *supra*, p. 15) were cases in which "a defense counsel's course of conduct involving pretrial publicity has been held to override the defendant's Sixth Amendment right to counsel of his own choosing."

Standard 3.5 of the ABA Project on Standards for Criminal Justice, *Standards Relating to the Function of the Trial Judge* (1972 (pp. 45-46)* recognizes both that a defendant's request to be represented by an outside attorney

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* These standards were recommended by the Advisory Committee on the Judge's Function and approved by the ABA House of Delegates in August, 1972.

should be given "great deference" and that permission may be denied an attorny who misbehaves:

> "3.5 Attorneys from other jurisdictions.
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> "If an attorney who is not admitted to practice in the jurisdiction of the court petitions for permission to represent a defendant, the trial judge may
>
> "(a) deny such permission if the attorney has been held in contempt of court or otherwise formally disciplined for courtroom misconduct, or if it appears by reliable evidence that he has engaged in courtroom misconduct sufficient to warrant disciplinary action;"

Although subparagraph (a) specifically refers only to "courtroom misconduct", the Committee's Commentary makes it clear that this enumeration only "sets forth some grounds (by no means exclusive) upon which a judge might justifiably decline to permit counsel to be specially admitted." The Commentary states (p. 46):

> "Great deference should be given to the request of a defendant to be represented by counsel of his choice. Yet there is no absolute right to be represented by counsel who is not admitted to practice in the jurisdiction of the court. Subparagraph (a) sets forth *some grounds (by no means exclusive) upon which a judge might justifiably decline to permit counsel to be specially admitted;* and subparagraph (b) suggests some conditions which might be imposed, with the objective of minimizing the risk that a trial may be aborted by misconduct of counsel. *No rigid rules are appropriate, however, and each application should be considered on its own circumstances.* The trial judge should apply the law of the forum in determining whether this misconduct brought to his attention would warrant disciplinary action." (Empasis supplied.)

A trial judge may properly regard out-of-court misconduct likely to interfere with a fair trial as grounds for denying leave to appear specially.

Of course, refusal to comply with the rules of court and ethical standards is also good cause for denying admission to the bar in the first instance, and for suspension or disbarment once an attorney has been admitted. The right of an accused who wishes to be represented by a lawyer not admitted to the local bar can be no greater than that of a defendant with local counsel. Since special permission to appear must be granted in such cases, the Court must have at least as broad an authority to deny leave as would a court to which the attorney was admitted; indeed, the discretionary character of the application for leave suggests that the authority in dealing with such applications should be broader.

One reason is the lesser ability of a court to discipline or control attorneys not members of its bar. Some attorneys may feel less impelled to act respectfully or otherwise comply with ethical standards in courts in which they do not have to continue to practice. Compare *State* v. *Kavanaugh, supra.* Another reason is that disbarment or suspension is a much more drastic sanction than exclusion from a single case in a court which the attorney does not generally practice.

Neither the Sixth Amendment nor any other principle of law guarantees a defendant the right to be represented by counsel not admitted to the local bar who has violated and threatens to violate the ethical standards embodied in the Court's rules and the Code of Professional Responsibility.

The critical issue remains as to whether the rules of ethical considerations which condemn Mr. Kunstler's conduct are incompatible with the First Amendment.

II. THE ETHICAL STANDARDS HERE IN ISSUE ARE COMPATIBLE WITH THE FIRST AMENDMENT.

A. The Rules Against Pretrial Publicity by Counsel in a Criminal Case.

Mr. Kunstler contends that the portions of Rule 27 and DR 7-707 of the Code of Professional Responsibility here involved are "facially unconstitutional."

It may be assumed that the First Amendment would preclude a prohibition against similar statements by the press or other persons not counsel for parties to the litigation. The test would then be whether there was "a serious and imminent threat to the administration of justice." *Craig* v. *Harney*, 331 U.S. 367, 373 (1947); *Bridges* v. *California*, 314 U.S. 252, 263 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Wood* v. *Georgia*, 370 U.S. 375, 384-385 (1962). Those cases impose a heavy burden which the prohibitor of such statements must satisfy. "The substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Bridges, supra*, at 263, quoted in *Wood*, at 384. "To warrant a sanction '[t]he fires which [the expression] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." *Craig* v. *Harney*, at 376, quoted in *Wood* at 385.

This test, petitioner submits, is not applicable to statements by lawyers in relation to pending litigation. The ethical standards of the profession, embodied for many years in the Canons of Professional Ethics and now in the Code of Professional Responsibility, have long disapproved of public statements by trial counsel which might influence the outcome of a trial. The philosophy underlying this limi-

tation is well stated in EC 7-33 of the present Code, *supra*, p. 4.

Former Canon 20 was designed to deal with the problem. It provided:

> "20. *Newspaper Discussion of Pending Litigation*
> "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement."

In 1964 the Supreme Court of New Jersey relied on this Canon as prohibiting "statements to news media by prosecuting attorneys" which had "the capacity to interfere with a fair trial." *State* v. *Van Duyne*, 43 N.J. 368, 204 A.2d 841, 852, 11 A.L.R.3d 1086, 1102 (1964). The same ban, the New Jersey Supreme Court continued (204 A.2d at 852):

> ". . . applies as well to defense counsel. The right of the State to a fair trial cannot be impeded or diluted by out-of-court assertions by him to news media on the subject of his client's innocence. The courtroom is the place to settle the issue and comments before or during the trial which have the capacity to influence potential or actual jurors to the possible prejudice of the State are impermissible."

In *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), this Court aced up to the difficulties in reconciling the constitutional guarantees of a fair trial and a free press. The Court there reversed Dr. Sheppard's conviction for murder on the ground that "prejudicial news items [traceable] to the prosecution, as well as the defense" (p. 361) deprived

the defendant of a fair trial. The Court went further, however, to suggest means whereby the courts could lawfully adopt "remedial measures that will prevent the prejudice at its inception" (p. 363). In strong, indeed mandatory language, this Court declared (p. 363):

> ". . . The courts *must* take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is high censurable and worthy of disciplinary measures." (Emphasis supplied.)

With respect to extrajudicial disclosures by counsel, the Court was quite explicit, in language from which Rule 27 and DR 7-707 were plainly drawn. The Court said, citing the *Van Duyne* decision of the New Jersey Supreme Court and former Canon 20 (p. 361):

> "More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the *identity of prospective witnesses or their probable tetimony; any belief in guilt or innocence; or like statements concerning the merits of the case.* See *State* v. *Van Duyne*, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements. . . ." (Emphasis supplied.)

Subparagraphs (5) and (6) of DR 7-107(B) and (4) and (6) of the third paragraph of Rule 27, *supra*, pp. 4, 5, the provisions most directly involved here, were obviously

derived from the emphasized references in the above passage.

The impact of these pronouncements in the *Sheppard* case is described in the Report of the Kaufman Committee of the Judicial Conference on the *Operation of the Jury System on the "Free Press-Fair Trial" Issue,* published in 45 F.R.D. 391 (1969).

> "It was in Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507 (1966), that the Supreme Court laid down a mandate to the courts to deal with the problems caused by the impact of publicity on the jury system. . . . (P. 395.)
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> • • •
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> "The adjuration of Sheppard v. Maxwell has given impetus to one of the most searching debates in recent legal history as to methods of solving the problems of fair trial and free press. In December 1966, the American Bar Association's Advisory Committee on Fair Trial and Free Press under the Chairmanship of Justice Paul C. Reardon of the Massachusetts Supreme Judicial Court released a tentative draft of its report. This report, the product of more than 20 months of study and labor by the Committee and its Reporter, Professor David L. Shapiro of the Harvard Law School, contains specific recommendations on how the impact of publicity on the administration of criminal justice can be controlled. . . ." (P. 397.)

The Reardon Committee's proposal was approved by the American Bar Assocation in 1968, and subsequently incorporated in DR 7-107 of the Code of Professional Responsibility, approved by the American Bar Association in 1970.

The Kaufman report was the work of a committee of the Judicial Conference of the United States headed by Circuit Judge Kaufman of the Second Circuit and a subcom-

mittee chaired by District Judge Gignoux of Maine.* The report stated (45 F.R.D. at 407);

> "The Committee is recommending the adoption in substance of the proposed Canon as it appears in Section 1.1 of the Proposed Final Draft of the Reardon Report. In the interest of establishing a uniform standard of conduct for attorneys in criminal cases in both the state and the federal courts throughout the country, the Committee feels that there is merit in adopting in substance the formulation proposed to be included in the American Bar Association's Code of Professional Responsibility.
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> • • •
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> "The Committee recommends action in three major areas. First, it feels that each United States District Court has the power and the duty to control the release of prejudicial information by attorneys who are members of the bar of that court, and it recommends action by local rule to restrict the release of such information on penalty of disciplinary action. (P. 401.)
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> ". . . At its February 1968 session, the Judicial Conference of the United States agreed to accept this report for study, and to that end *directed that it be circulated to all federal judges with a request that their comments and suggestions be communicated to the Committee no later than July 1, 1968.* The *individual and collective opinions* of federal judges reported to the July 18th meeting of the Committee *overwhelmingly reflected general satisfaction* with all recommendations of the report. . . ." (P. 400.) (Emphasis supplied.)

"The Kaufman Committee Report was subsequently adopted by the Judicial Conference of the United States and implemented by Local 'Free-Press—Fair Trial' Rules promulgated by each District Court." *United States* v. *Dickinson*, 465 F.2d 496, 505 (5th Cir. 1972).

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* The committee was composed of three circuit judges and nine district judges.

No subsequent opinion of this Court in any way impairs the authority of the portion of the *Sheppard* opinion from which the rule was taken. In these circumstances, Mr. Kunstler's argument that the Rule and Code are "facially unconstitutional" is, to say the least, unpersuasive.

That such restrictions on the conduct of the litigating lawyer would be constitutional was foreshadowed in *In re Sawyer*, 360 U.S. 622 (1959), in which this Court was confronted with a problem similar in many respects to that presented here. While a trial charging conspiracy in violation of the Smith Act was going on, one of trial counsel made a public speech which the Supreme Court of Hawaii and the Ninth Circuit construed as an attack upon the integrity of the federal district judge and his fairness and impartiality in trying the case. The Hawaiian Supreme Court suspended the lawyer from practice for one year. Although five justices of this Court, including Mr. Justice Stewart in a concurring opinion, voted to reverse on the ground that the attorney was at most "voicing strong criticism of Smith Act cases and the Government's manner of proving them," the four dissenters and Mr. Justice Stewart expressed the view that the attorney could have been disciplined if her remarks had violated the standards of the profession, as Justices Frankfurter, Clark, Harlan and Whittaker (but not Stewart) thought they had.

Mr. Justice Frankfurter's opinion, which on the constitutional question represented the views of a majority of the Court, stated (360 U.S. at 668):

> ". . . Here was a public meeting addressed by counsel for the defense, haranguing a crowd on the unfairness to the defendant of the proceedings in court, *with the high probability indeed almost certainty under modern conditions that the goings-on of the meeting would come to the attention of the presiding judge and the jury.* It took place in a case in which public interest and public

tempers had been aroused. When the story of the meeting came to the attention of the judge, he felt obliged publicly to defend his conduct. *It is hard to believe that this Court should hold that a member of the legal profession is constitutionally entitled to remove his case from the court in which he is an officer to the public and press,* and express to them his grievances against the conduct of the trial and the judge. '*Legal trials,*' said this Court, '*are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.*' *Bridges* v. *California,* 314 U.S. 252, 271.

"Even in the absence of the substantial likelihood that what was said at a public gathering would reach the judge or jury, conduct of the kind found here cannot be deemed to be protected by the Constitution. An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense. He does not lack for a forum in which to make his charges of unfairness or failure to adhere to principles of law; he has ample chance to make such claims to the courts in which he litigates. As long as any tribunal bred in the fundamentals of our legal tradition, ultimately this Court, still exercises judicial power those claims will be heard and heeded." (Emphasis supplied.)

Mr. Justice Stewart faced up to the problem whether the litigating lawyer was bound by the ethical standards of the profession. He stated:

"If, as suggested by my Brother Frankfurter, there runs through the principal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from evenhanded discipline for proven unethical conduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.

> *"Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.* * * *
>
> "In the present case, if it had been charged or if it had been found that the petitioner attempted to obstruct or prejudice the due administration of justice by interfering with a fair trial, this would be the kind of a case to which the language of the dissenting opinion seems largely directed. * * *" (Emphasis supplied.)

The *Sawyer* case parallels this case in two respects. In the first place, the litigating lawyer there as here sought to try his case "through the use of the meeting-hall, the radio, and the newspaper", with a high probability that what was said "would come to the attention of the presiding judge and jury." Secondly, the *Sawyer* case was concerned with a public challenge to the trial judge's integrity and impartiality, as to which see pp. 8, 9, 11, 12, *supra*. As to both points Mr. Justice Frankfurter's opinion states that such behavior by trial counsel is not protected by the First Amendment, and Mr. Justice Stewart indicated agreement on the law though not as to the interpretation of the substance of the lawyer's remarks in that case.

Thus the opinions of Justices Stewart and Frankfurter together indicated that the majority of this Court was of the view that the First Amendment did not preclude the temporary disbarment of trial counsel for statements which might affect the fairness of a pending case. Since the instant case concerned only the discretionary authority to grant leave to appear *pro hac vice*, the District Court's action did not go that far.

The Court of Appeals below relies on *Chase* v. *Robson*, 435 F.2d 1059 (9th Cir. 1970). The scope of the prohibitions involved in the *Chase* case may have warranted application there of the broad First Amendment standard of "clear and present danger" or "serious or imminent threat to

the administration of justice". But to read those cases more broadly as governing cases like this, would make them inconsistent with the authorities discussed earlier in this brief, the *Sawyer* and *Sheppard* cases in particular, which demonstrate that the test is different for counsel actually participating in a criminal case. These authorities establish that specific prohibitions such as those contained in DR 7-107 and Rule 27 may be generally enforced without further showing of a likelihood that their violation in each individual case will seriously prejudice the administration of justice. Indeed, the suggestion in *Sheppard* (384 U.S. at 363, *supra*, p. 30) that "courts must take steps by rule and regulation" means that a general rule governing the conduct of counsel was both called for and constitutional.

The Court of Appeals in *Chase* referred to "the lesser standard" of reasonable likelihood of a "serious and imminent threat to the administration of justice". The phrase "reasonable likelihood" appears both in *United States v. Tijerina*, 412 F.2d 661, 663 n. 1, 666 (10th Cir. 1969), and in the introductory paragraph to the Reardon and Kaufman committee proposals embodied in District Court Rule 27.

In the *Tijerina* case the Tenth Circuit rejected the contention that a clear and present danger test governs the application of an order prohibiting outside publicity in a particular case, saying (412 F.2d at 666):

> "Counsel attack the order on the ground that it is not based on a clear and present danger. The order is based on a 'reasonable likelihood' of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial. We believe that reasonable likelihood suffices. The Supreme Court has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about the trial."

The Court then pointed out that in *Sheppard* the Supreme Court "established guidelines necessary to assure a fair trial in a case which attracted wide publicity" (p. 667), and concluded:

> "The ultimate question is whether the application to the defendants of an order against extrajudicial statements violates their rights of freedom of speech. The defense argument necessarily places freedom of speech in a preferred position above fair trial. . . . This preferred position has never been approved in a case where a balance must be had between free speech and fair trial. Indeed, the Court has awarded the preference to fair trial. . . .
>
> "The order against extrajudicial statements was designed to maintain the atmosphere essential to the preservation of a fair trial, 'the most fundamental of all freedoms.' . . ."

The text of Rule 27 (which is the rule recommended by the Judicial Conference and the Kaufman committee) demonstrates that the prohibitions upon the public dissemination by trial counsel of statements with respect to the enumerated subjects was not to be watered down by requiring proof of more than the fact that these specific prohibitions had been disregarded.

Rule 27 enumerates the specific restrictions on counsel after arrest or the filing of a complaint, information or indictment. With respect to the six specific subparagraphs, the Kaufman report describes the Reardon committee recommendation (which it adopted) as contemplating (45 F.R.D. at 407):

> ". . . *an absolute prohibition* of extrajudicial disclosure by attorneys of prior criminal records, confessions, tests, witnesses, opinions as to the guilt or innocence of the accused, the merits of the case or the evidence involved, as well as other described matters potentially prejudicial in nature." (Emphasis supplied.)

Thus clearly it was not contemplated that further evidence would be necessary in every case to show that the prohibited disclosures were reasonably likely to interfere with a fair trial or the administration of justice. On the contrary, the whole purport of the recommendations and the Rule was that there would be a reasonable likelihood of such an interference whenever the types of statements specifically prohibited occurred while the criminal case was pending, and that therefore a general prohibitory rule —"an absolute prohibition"—was justified.

It is submitted therefore that the criteria which govern the protection of First Amendment freedoms in other circumstances—the need for proof of "a serious or imminent threat" or "a clear and present danger" in a particular case—is not an appropriate guide to determining the propriety of public statements by trial counsel during the pendency of litigation. It must be sufficient, if the objects of the constitutional provisions which seek to guarantee impartial justice are to be achieved, that the rules governing attorneys' conduct prohibit the types of statements which are generally reasonably likely to interfere with the fairness of trials.

The majority of the Supreme Court in *Sawyer* and *Sheppard* obviously did not believe that the *Bridges-Pennekamp-Craig* doctrine was applicable in such circumstances. Accordingly, the invocation of the doctrine of the later cases in the Court of Appeals' decision in *Chase*, while perhaps not inappropriate for the facts presented in that case, should not be extended so as to nullify the specific guidelines to an attorney's conduct embodied in Rule 27 and DR 7-107 of the Code of Professional Responsibility.

B. The Incitations to Demonstrate and Fill the Courtroom.

In the course of the speech and press interview in which he communicated to the public his views as to the credibility of possible witnesses and the merits of his client's case, Mr. Kunstler also urged his listeners to "organize demonstration [sic] in support of Banks," "to fill the courtroom with sympathetic spectators during the trial," "to do everything possible to support the trial" and "anything they can do to call attention to the trial will be welcome. I am not asking them to blow up the courthouse but that would certainly draw attention." His broadcast urged "physical confrontation. . . ." "Picket the Courthouse, do anything that will contribute to the issue." See pp. 7, 9, 10, *supra*. Before the District Court he insisted he had a right under the First Amendment to do this.

The obvious purpose of these remarks was to aid his client by putting pressure on the judge and jury, to influence them through factors entirely extraneous to what would come before them in the ordinary course of an orderly hearing. There is no other way in which Mr. Kunstler could have thought that organizing demonstrations, filling the courtroom, picketing the courthouse or drawing public attention to the trial could have helped him.

Neither the Code of Professional Responsibility nor any Rule of Court in precise words prohibits an attorney from engaging in conduct of this sort—perhaps most lawyers do not have to be told that it would undermine the just functioning of our system of law. DR 1-102(A)(5) and EC 7-36, quoted at pp. 4, 5, *supra*, which forbid "conduct prejudicial to the administration of justice," and conduct "that offends the dignity and decorum of proceedings," come the closest. But for counsel to attempt to influence judges and juries by inciting demonstrations or by filling

the courtroom more seriously prejudices the fair and lawful administration of justice than mere breaches of dignity or decorum. And this is so even if it be assumed that demonstrators will not be violent, and that the attorney will not deliberately stimulate disorder in the courtroom; a courtroom packed with enthusiasts for one side has an obvious potential for such disorder, as any knowledgeable person would recognize.

The underlying concept of fairness in judicial proceedings is that cases will be decided on the facts in evidence and under the law as understood by the judge, without outside influence. An attempt to bring extraneous factors to bear on judge and jury is thus an effort to subvert the foundation of the judicial process. It may be that judges and juries are not always influenced by all outside considerations. But this does not excuse a litigating lawyer who deliberately incites others to exert or to attempt to exert outside influence as a tactical device. Such conduct clearly goes beyond permissible means of zealously representing a client.

This would be patently obvious if many lawyers in many cases sought to arouse the public to demonstrate or pack courtrooms in support of their clients. Unless the practice was halted, the fair administration of justice would become impossible. And such tactics do not become more tolerable because exercised in behalf of members of minority groups, or only in cases which lawyers are convinced of their clients' rectitude and fear that the unpopularity of their cases may make it difficult for them to win. These are precisely the situations in which an unpressured tribunal is the most vital. For pressure and influence may be exerted more powerfully by majorities than minorities.

Since the incitations in question would be "prejudicial to the administration of justice" in contravention of DR

1-102(A)(5), the attorney's action is not protected by the First Amendment. The basic reason is the same as for violations of the Code provisions governing pretrial publicity, discussed at pp. 21-31, *supra*—fair trials and due process of law are dependent upon fair and unbiased judges and juries.

The question here is not whether persons generally have a right to attend proceedings in courtrooms, or to demonstrate or organize demonstrations relating to a pending case. Whether they do or not may or will depend on the circumstances, and Mr. Kunstler's remarks are not specific as to time or place or content or noisiness or orderliness, except for his specific plea for filling the courtroom with sympathizers. The issue here is whether the Constitution guarantees the litigating attorney the right to try to influence a court in this manner. Mr. Justice Stewart's admonition in *Sawyer* (*supra*, p. 28) that an attorney may be bound by ethical precepts to abstain from what "might be constitutionally protected speech for others" is equally applicable to such statements as well as to those discussed in Point IIA. And so is the teaching of *Sheppard* v. *Maxwell*, that one means of reconciling the fair trial-free press dilemma is to leave the press and other persons free but to adopt rules restricting what the counsel for the parties may communicate to the public while a case is pending. In *Cox* v. *Louisiana* (No. 2), 379 U.S. 559 (1965), this Court upheld a statute making it a crime to picket or parade near a courthouse "with the intent of interfering with . . . the administration of justice or . . . of influencing any judge, juror, witness or court officer." The unspoken premise of the opinion was that the same sort of picketing might have been lawful in other circumstances. The majority opinion of Mr. Justice Goldberg, with no dissent on this point, said (379 U.S. at 562):

"There can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create. Since we are committed to a government of laws and not of men, it is of the utmost importance that the administration of justice be absolutely fair and orderly. This Court has recognized that the unhindered and untrammeled functioning of our courts is part of the very foundation of our constitutional democracy. See *Wood* v. *Georgia*, 370 U.S. 375, 383. The constitutional safeguards relating to the integrity of the criminal process attend every stage of a criminal proceeding, starting with arrest and culminating with a trial 'in a courtroom presided over by a judge.' *Rideau* v. *Louisiana*, 373 U.S. 723, 727. There can be no doubt that they embrace the fundamental conception of a fair trial, and that they exclude influence or domination by either a hostile or friendly mob. There is no room at any stage of judicial proceedings for such intervention; mob law is the very antithesis of due process. See *Frank* v. *Mangum*, 237 U.S. 309, 347 (Holmes, J., dissenting). A State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence."

The *Cox* case differs from this one in that the Court there relied on the specificity of the criminal statute and because picketing and parading were regarded as conduct and not merely speech. But the same passage (p. 563) reviews the cases holding that verbal incitations to wrongful conduct do not have First Amendment protection. Verbal incitation to exert pressure on a judicial tribunal would seem to fall in the same category. Furthermore, Mr. Kunstler is not being subjected to criminal penalties, but only prevented from trying a case in a court to which he has not been admitted to practice. And Mr. Banks is not precluded from obtaining competent counsel, from Indiana or elsewhere.

CONCLUSION

The Court of Appeals attempts to suggest that petitioner was concerned solely with the right of respondent to a fair trial. Petitioner was indeed concerned with the right of respondent, but petitioner was also concerned with the rights of the prosecution and the public. Petitioner submits that such broad concern is evident in his opinion where he referred to the rights of both "Mr. Banks" and "the public . . . to a fair and impartial trial" and also the "obligation [of the Court] . . . to provide a fair and impartial trial to all parties."

However, the Court of Appeals does address the broader question which requires a balancing of the rights of all parties and the public. The Court held "before a trial court may properly limit the defendant's right to a chosen counsel, there must be sufficiently supported and specific findings of fact that the conduct of the defendant's attorney creates a serious and imminent threat of 'significant prejudice to the defendant himself' or of 'disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' "

The Court of Appeals relies only on two cases to resolve the free speech-fair trial-right to counsel issues. *Magee* v. *Superior Court of City & County of San Francisco,* 506 P.2d 1023 (1973); *Chase* v. *Robson,* 435 F.2d 1059 (7th Cir. 1970). Petitioner submits that the Court's combination of the holdings of those two cases is clearly erroneous. The conclusion based on *Chase* that an attorney's conduct must be specifically found to have a "serious and imminent threat" to a fair trial is a misplaced reliance on the law governing free speech of persons other than lawyers in a pending case. This Court in *Sawyer* and *Sheppard* clearly indicated that the conduct of lawyers participating in a pending case is subject to a different standard. Further-

more, the Court of Appeals abandoned the lesser standard it had previously recognized in *Chase*, that certain conduct may be assessed in terms of having a "reasonable likelihood" of threatening a fair trial and the administration of justice. That was the standard established in the 10th Circuit in *Tijerino*. With respect to the Court's reliance on *Magee*, it is true that the court in that case did recognize that conduct of a lawyer is an appropriate consideration in determining his admission *pro hac vice*, but the Court was not in fact concerned with any conduct of counsel and did not state that lawyer conduct when in issue must be measured in terms of whether it poses a serious and imminent threat to a fair trial.

In summary it is submitted that the court below decided a question in conflict with this Court's decisions in *Sawyer* and *Sheppard*, that the decision below is in conflict with the appellate court of another circuit, viz., *Tijerino*, and to the extent this Court has not by its prior opinions specifically sanctioned the rules regarding conduct of counsel in pending criminal cases there are presented important questions of federal law, which have not been, but should be settled by this Court.

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EXHIBIT A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 17, 1973.

Before

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. THOMAS E. FAIRCHILD, *Circuit Judge*

ARTHUR BANKS, *Petitioner,*	
No. 73-1332 *vs.*	Original Petition for Writ of Mandamus. (TH 72 CR 47)
HON. CALE J. HOLDER, United States District Judge, *Respondent.*	

Petitioner, Arthur Banks, seeks a writ of mandamus directing the respondent to vacate his orders of April 1, 1973, denying the motion of Attorney William M. Kunstler for leave to represent the petitioner in a criminal prosecution presently pending in the United States District Court for the Southern District of Indiana and denying a motion to disqualify himself, to vacate his order of April 2, 1973, appointing a new attorney for the petitioner, to appoint no other counsel for petitioner pending determination of this mandamus petition, and to disqualify himself from participating in any further proceedings in *U.S.A.* v. *Arthur C. Banks,* TH 72-CR-47. The petition

also seeks a stay of the trial proceedings, scheduled to commence on May 21, 1973, for such time as may be necessary to enable this Court to hear and determine this petition. The petition is supported by numerous exhibits, an affirmation filed by William M. Kunstler, and a "response to undated entry." The U.S. Attorney filed a motion for leave to correct and supplement defendant's petition for writ of mandamus and the petitioner filed a response to said motion. Pursuant to our order of April 13, 1973, a transcript of the proceedings held in this case on December 20, 1972, January 2, 1973, February 2, 1973, March 29, 1973, April 1, 1973 and April 3, 1973, was filed with this Court on April 19. On April 27, this Court ordered a response to the petition for writ of mandamus, pursuant to Rule 21(b), F.R.A.P. On May 14, the answer of the respondent United States of America was filed. By letter dated May 9, the respondent judge joined in said answer. In addition to the answer, U.S. Attorney has filed a "request for instructions," calling this Court's attention to the fact that this case will be tried before the Honorable James E. Noland, who is not named as a party to this mandamus proceeding.

The petition for writ of mandamus raises an important issue concerning the extent of a defendant's Sixth Amendment right to representation by counsel of his own choosing. See *U.S.* v. *Seale*, 461 F.2d 345 (7th Cir. 1972).

In denying Mr. Kunstler's application for leave to appear as counsel, the district court stated:

> "The record discloses that petitioning attorney engaged in a pattern of pre-trial publicity, i.e., public statements, interviews and press conferences with various sectors of the news media, and authorized press releases, in the Terre Haute Division of the Court as well as in Indianapolis, Indiana, which have resulted in the dissemination in newspapers, and on radio and television

broadcasts, within the Terre Haute Division of this Court, of statements by petitioning attorney regarding, among other things, the defendant's prior criminal record, the identity and credibility of prospective witnesses, the petitioning attorney's opinion as to the defendant's innocence and as to the merits of the subject cause and evidence in the subject cause all of which seriously reduces the prospect of obtaining a fair and impartial jury in the Terre Haute Division of the Court for trial of the subject cause. Petitioning attorney also in connection with the aforementioned statements regarding the subject cause made statements analogizing the status of the defendant with certain public and political issues of current controversy which further reduces the prospect of obtaining a fair and impartial jury in the Terre Haute Division of the Court for trial of the subject cause. Among public statements in Terre Haute, Indiana, petitioning attorney sought and requested certain segments of the community to support the defendant's case by, *inter alia,* filling the spectator section of the courtroom and the adjacent hallways thereto which, if achieved, would be a serious impediment in the Court's ability to provide the proper judicial decorum which is conducive to a fair and impartial trial and may well act to intimidate and/or alienate the jury."

The district court also cited the delays which have occurred in bringing the case to trial since the first arraignment on December 20, 1972, and Mr. Kunstler's statement that he intended to continue similar pre-trial activity. The district court then concluded that his conduct violated both Local Rule 1(f), providing that the Code of Professional Responsibility shall be the standards of conduct for members of the Bar of that court and Local Rule 27, regarding the release of information by attorneys in criminal cases from time of indictment until trial, which rule is substantially the same as Disciplinary Rule 7-107 of the Code of Professional Responsibility of the American Bar Association.

In reviewing the papers filed in this mandamus proceeding we are impressed by the district court's deep concern for protecting the right of a defendant to a fair and impartial jury, which concern is the thrust of the above Local Rules. However, in this case, unlike most cases involving potentially prejudicial pre-trial publicity, the defendant has insisted throughout the proceedings that he is satisfied with his counsel's representation. Defendant Banks was present at the April 1 hearing in which Mr. Kunstler's public statements were discussed at length and he stated unequivocally that he wanted Mr. Kunstler as his attorney. We have not been referred to any case in which a defense counsel's course of conduct involving pre-trial publicity has been held to override the defendant's Sixth Amendment right to counsel of his own choosing. *Shepard* v. *Maxwell*, 384 U.S. 333 (1966), cited in the answer, does not involve the Sixth Amendment issue present here.

Furthermore, we note that the answer does not assert any right of the prosecution to prevent matters possibly prejudicial to its case from reaching prospective jurors, nor does it assert any inherent right of the court, independent of the defendant's Sixth Amendment rights, to limit pre-trial publicity in the interests of the orderly and fair administration of justice. Thus it is not necessary to determine at this time if such rights exist, and if so, what weight they should be given when balanced against the defendant's right to counsel.

In summary we believe that the defendant Banks has waived any right to object to Attorney Kunstler's course of pre-trial publicity as denying him his Sixth Amendment right to a fair and impartial jury. Accordingly,

IT IS ORDERED that the petition for writ of mandamus be GRANTED. The district court's order of April 1, denying Mr. Kunstler's leave to appear as counsel for the de-

fendant Banks, and the order of April 2, appointing new counsel, are vacated. Since we are advised by the U. S. Attorney that the respondent judge will not preside at the trial, no ruling is necessary on the prayer for an order directing the respondent to disqualify himself. We leave the matter of a stay of the trial proceedings to the discretion of the trial judge. We do not express an opinion as to what, if any safeguards, the trial judge may find it necessary to impose during the course of the trial to preserve fair, impartial, and orderly proceedings.

EXHIBIT B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 1, 1973.

Before

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. THOMAS E. FAIRCHILD, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*

ARTHUR BANKS,
Petitioner,

No. 73-1332 *vs.*

HON. CALE J. HOLDER,
United States District Judge,
Respondent.

Original Petition for Writ of Mandamus. (TH 72 CR 47)

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, a vote of the active members of the Court was requested, and a majority of the active members of the Court having voted to deny the rehearing *en banc*,

IT IS ORDERED that the petition for rehearing *en banc* be, and the same is hereby denied.

Judges Cummings, Pell, and Stevens voted to grant the rehearing *en banc*.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 1, 1973.

Before

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. THOMAS E. FAIRCHILD, *Circuit Judge*

ARTHUR BANKS,
Petitioner,

No. 73-1332 *vs.*

HON. CALE J. HOLDER,
United States District Judge,
Respondent.

Original Petition for Writ of Mandamus. (TH 72 CR 47)

ORDER

On Petition for rehearing.

We noted in our order dated May 17, 1973, that the answer did not raise the question whether prejudice to the government's case or impairment of the orderly and fair administration of justice (in a broader sense than the infringement of the interests of the petitioner) arising from Mr. Kunstler's public statement, may have justified respondent's order denying Mr. Kunstler's application.

Surely that question was not explicitly raised. The transcript of the April 1 hearing makes it clear that the chief concern of respondent was possible prejudice to petitioner. The statements by Mr. Kunstler which were brought out at the hearing covered a considerable spectrum. A few,

concerning the merits of the controversy, were clearly improper when made publicly by an attorney for a party. Others were expressions of opinion on public matters which could not be subject to any legal restraint. Although the former, if believed by the public, would create opinion adverse to the government, respondent appeared to assume that they, as well as the latter, would irritate members of the public and thus create prejudice against the petitioner. Respondent's preoccupation with possible prejudice to the petitioner is evident from the portion of the finding quoted in our original order and also the following:

> "When petitioning attorney's conduct in the subject cause is reviewed in its entirety, the impact this must have upon potential jurors in the Terre Haute Division of the Court inevitably inures to the detriment of the defendant in the subject cause."

Much of the argument presented on motion for rehearing treats the broader issue, the task of balancing in this type of situation, the interest of the prosecution in obtaining a fair trial and the inherent right of the court to protect the public's interest in the orderly and fair administration of justice, on the one hand, against the defendant's sixth amendment right to counsel of his own choosing.

In considering the broader issue, we conclude that before a trial court may properly limit the defendant's right to a chosen counsel, there must be sufficiently supported and specific findings of fact that the conduct of the defendant's attorney creates a serious and imminent threat of "significant prejudice to the defendant himself" or of "disruption of the orderly processes of justice unreasonable under the circumstances of the particular case." *Magee* v. *Superior Court of City & County of San Francisco*, 8 Cal. 3rd 949, 506 P.2d 1023 (1973). See *Chase* v. *Robson*, 435 F.2d 1059 (7th Cir., 1970).

Because interference with the individual's choice of counsel should be kept to the necessary minimum, in each case the trial court must consider carefully whether a less drastic alternative, such as a narrow injunction limiting particular kinds of public statements, would suffice to protect the other interests at stake. Of course, to the extent that the defendant knowingly and intelligently endorses the conduct of his attorney in making speeches and press releases, he waives his right to claim that he has been denied his sixth amendment right to a fair and impartial trial.

The findings of respondent in this case clearly did not meet this standard. Our independent review of the record reveals that the hearing did not include this broader issue within its focus, and that the evidence with respect to the statements which could be deemed improper would not support such a conclusion.

Petition for rehearing is denied.

EXHIBIT C

UNITED STATES DISTRICT COURT
Southern District of Indiana
Terre Haute Division

UNITED STATES OF AMERICA *v.* ARTHUR C. BANKS	No. TH 72-Cr-47

ENTRY

The matter of Mr. William M. Kunstler's March 21, 1973 application pursuant to Rule 1(c) of the Rules of the United States District Court for the Southern District of Indiana for leave to appear as counsel for the defendant in the subject cause came on for ruling. The Court, having read and considered petitioning attorney's motion and the tendered notice of appearance received on March 21, 1973, the Government's March 21, 1973 motion for a hearing on petitioning attorney's application for leave to appear as counsel for the defendant in the subject cause, petitioning attorney's April 1, 1973 affidavit in support of his application, and having had an evidentiary hearing on this matter on April 1, 1973 wherein evidence was submitted and argument heard by all parties, and being duly advised in the premises, does now submit its ruling.

The Court, in the sound exercise of its discretion, does hereby DENY Mr. William M. Kunstler's application for leave to appear as counsel for the defendant in the subject cause for the reasons set forth below. The record discloses that petitioning attorney engaged in a pattern of pre-trial

publicity, *i.e.*, public statements, interviews and press conferences with various sectors of the news media, and authorized press releases, in the Terre Haute Division of the Court as well as in Indianapolis, Indiana, which have resulted in the dissemination in newspapers, and on radio and television broadcasts, within the Terre Haute Division of the Court, of statements by petitioning attorney regarding, among other things, the defendant's prior criminal record, the identity and credibility of prospective witnesses, the petitioning attorneys' opinion as to the defendant's innocence and as to the merits of the subject cause and evidence in the subject cause, all of which seriously reduces the prospect of obtaining a fair and impartial jury in the Terre Haute Division of the Court for trial of the subject cause. Petitioning attorney also in connection with the aforementioned statements regarding the subject cause made statements analogizing the status of the defendant with certain public and political issues of current controversy which further reduces the prospect of obtaining a fair and impartial jury in the Terre Haute Division of the Court for trial of the subject cause. Among public statements in Terre Haute, Indiana, petitioning attorney sought and requested certain segments of the community to support the defendant's case by, *inter alia*, filling the spectator section of the courtroom and the adjacent hallways thereto which, if achieved, would be a serious impediment in the Court's ability to provide the proper judicial decorum which is conducive to a fair and impartial trial and may well act to intimidate and/or alienate the jury. The record in the subject cause is replete from the first arraignment in the subject cause on December 20, 1972 with delay occasioned by petitioning attorney's failure to appear as counsel in the subject cause. Petitioning attorney's professional work load and political activity would indicate that further delay in bringing the subject

cause to trial can be anticipated due to conflicts with petitioning attorney's schedule.

Most significantly, the record discloses that petitioning attorney stated his intention to continue in his course of activity, in form and substance, regarding his aforementioned pre-trial publicity relating to the defendant's prior criminal record, the identity and credibility of prospective witnesses, his opinion as to the defendant's innocence and as to the merits of the subject cause and evidence in the subject cause. Rule 1(f) of the Rules of the United States District Court for the Southern District of Indiana discloses that the Code of Professional Responsibility shall be the standards of conduct for members of the Bar of this Court. Inspection of Canon 7, Ethical Consideration 7-33, and Disciplinary Rule 7-107(B) of the Code of Professional Responsibility and Rule 27 of the Rules of the United States District Court for the Southern District of Indiana, copies of which are attached hereto and incorporated herein, reveal that petitioning attorney's course of pre-trial publicity is violative of the standards of conduct for members of the Bar of this Court as well as a direct breach of Local Rule 27 regarding the release of information by attorneys in criminal cases from the time of indictment in the subject cause until the commencement of trial. Petitioning attorney's statement that he intended both in form and substance to continue his pre-trial publicity activities which are violations of the Rules of this Court is sufficient in and of itself to sustain the denial of his application to appear as counsel for the defendant in the subject cause. Were petitioning attorney allowed to appear as counsel for defendant in the subject cause, his avowed course of conduct regarding pre-trial publicity in the subject cause would subject him to citation for contempt(s) of Court which would be a further impediment in providing a fair

and impartial trial in the subject cause. When petitioning attorney's conduct in the subject cause is reviewed in its entirety, the impact this must have upon potential jurors in the Terre Haute Division of the Court inevitably inures to the detriment of the defendant in the subject cause. Neither Mr. Banks nor the public can waive their right to a fair and impartial trial in the subject cause nor can the Court abrogate its obligation upon its Constitutional Oath to provide a fair and impartial trial to all parties in the subject cause. The Court has denied the petitioning attorney's application for the reasons that petitioning attorney's stated course of future conduct will be in violation of the Rules of the Court and that the opportunity to afford a fair, impartial and speedy trial to all parties in the subject cause is best served thereby.

Dated this 2nd day of April, 1973.

CALE J. HOLDER, *Judge,*
United States District Court
Southern District of Indiana

EXHIBIT D

UNITED STATES DISTRICT COURT
Southern District of Indiana
Terre Haute Division

UNITED STATES OF AMERICA, *ex rel.* ARTHUR BURGHARDT (BANKS), *Relator,* *v.* MASON HOLLEY, *Warden* United States Penitentiary at Terre Haute, Indiana, *Respondent.*	No. TH 73-C-95

MEMORANDUM OF DECISION

Heretofore, on September 17, 1973, certain papers styled as above were filed in the Office of the Clerk of the United States District Court for the Southern District of Indiana, Terre Haute Division, whereupon the Deputy Clerk in charge of the office proceeded to assign the above entitled docket number thereto. Said Deputy Clerk further caused the case to be assigned to the undersigned judge by lot, as prescribed in the General Order of the Court.

Thereafter, the Court examined said papers to determine what, if any, action should be taken with respect thereto. Examination thereof revealed that, although they purport to state a petition for a writ of habeas corpus on behalf of one Arthur Burghardt Banks, styled as "relator," the actual petitioner appeared to be "William M. Kunstler, on behalf of relator." The peculiar fashion in which the pleading was drafted suggested to the Court a threshhold question as to whether or not the same was properly cognizable as a petition for a writ of habeas corpus.

The statute governing applications for such a writ, 28 USC § 2242, reads, in applicable part, as follows:

> "Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf."

It was noted immediately that the petition in question was not signed or verified by the person for whose relief it was intended, i.e., Arthur Burghardt Banks. Technically, it was not verified at all, inasmuch as the cryptic notation "sworn to before me this 7th day of September, 1973," executed by a purported New York notary public whose signature is illegible, does not state who, if anyone, actually swore to the document. Without regard to this last point, however, and assuming that the document was in fact sworn to by William M. Kunstler, it would then remain to be seen whether or not he would have the authority to institute the action on behalf of Banks under the peculiar setting of the case.

By way of review, it will be remembered that there is pending on the docket of this Court a criminal action entitled United States of America v. Arthur Chester Banks, No. TH 72-CR-47. The Arthur Chester Banks named as the defendant in such action is one and the same person styled by William M. Kunstler as Arthur Burghardt (Banks). The two cases quite obviously are directly related to each other.

With respect to the criminal case, the same William M. Kunstler, a member of the New York Bar, made application to the Court for permission to enter his appearance *pro hac vice* for the defendant Banks. After a hearing had on April 1, 1972, this Court, speaking through the Honorable Cale J. Holder, one of the judges thereof, denied leave to said attorney so to appear. Thereafter, the fol-

lowing further proceedings were had with respect to said order of April 1, 1973:

1. On April 5, 1973, Arthur Banks filed an original petition for writ of mandamus against Judge Holder in the United States Court of Appeals for the Seventh Circuit as Cause No. 73-1332.

2. After extensive briefs were submitted by both Arthur Banks and Judge Holder, the Court of Appeals on May 17, 1973, rendered an opinion and granted the petition for writ of mandamus.

3. Thereafter Judge Holder filed a motion to stay the effectiveness of the decision pending a petition for rehearing and a suggestion that the rehearing be *en banc*.

4. On May 29, 1973, the Court of Appeals granted said motion.

5. In connection with the petition for rehearing additional briefs were filed by both petitioner and respondent. Also both the American Bar Association and the American Civil Liberties Union were granted leave to file briefs as amici curiae.

6. The petition for rehearing raised questions of significance to the administration of justice concerning:

> "(1) The scope of a trial court's discretionary power to deny a criminal defendant's request that he be represented *pro hac vice* by an attorney not a member of the Court's bar, and in particular
>
> "(a) whether an attorney's violation of the rules of the Court and of the ethical standards of the legal profession warrants denial of the request, and
>
> "(b) whether such a denial is forbidden by the Sixth Amendment to the Constitution.
>
> "(2)(a) Whether the Rule and ethical standards which forbid an attorney in a criminal case from making

extrajudicial statements on specific subjects for public dissemination are compatible with the First Amendment.

"(b) Whether trial counsel's deliberate incitation of sympathizers to demonstrate and pack the courtroom was protected by the First Amendment."

Therefore, on September 17, 1973, the posture of the criminal case was that William M. Kunstler was without standing in this Court as attorney for the defendant Banks. Further, as the Court knows judicially, Kunstler has never been admitted generally as a member of the bar of this Court. In short, he had no standing or status in this Court on September 17, 1973, either as attorney for Banks *pro hac vice* or as a member of the bar of this Court entitled to file pleadings generally on behalf of persons desiring to institute legal actions.

It is true that under certain circumstances it is possible for one person to act on behalf of another in connection with the filing of a petition for a writ of habeas corpus, and in such instances the writ is ordinarily filed by one person for another in the capacity of next friend. However, the law in this regard is that a writ may be entertained in such fashion only in instances under which it may not be possible or feasible that the detained person sign and verify the complaint, such as in cases where access to the person is impossible or the person is a minor or under a mental incapacity. *United States* v. *Houston*, 273 F. 915 (2nd Cir. 1921). Absent a sufficient reason being tendered by the person who seeks to intervene on behalf of another, it has been held that the Court lacks jurisdiction in personam. *Wilson* v. *Dixon*, 256 F.2d 536 (9th Cir. 1958).

The said Kunstler, in his assumed status as petitioner, states in rhetorical paragraph 19 of the petition "The reason that this petition is made by one of relator's attor-

neys rather than by relator himself is that he is, as previously stated, presently confined in a penal institution some distance from where his attorneys have their offices." The Court deemed this statement a completely insufficient reason to entertain the petition as meeting the requirements of said § 2242, for two reasons. First, it was obvious that the petition could either have been mailed to Banks for verification or could easily have been taken to him for such purpose by Brent A. Barnhart, an attorney of Indianapolis, Indiana, whose signature likewise appears on the petition. Second, Kunstler had no standing in this Court as Banks' attorney, as above pointed out.

Reference to Barnhart brings up another unique facet of these related cases in that, although Barnhart's name appears on the petition described above, as well as upon various pleadings filed in the criminal action, Barnhart himself has steadfastly maintained that he does not appear for Banks, that he has no authority to appear for Banks, and that his status is simply that of local counsel for Kunstler, whatever that may mean. Therefore, in the absence of a general appearance entered by Barnhart for Banks, Barnhart's signature appended to the foregoing petition meant to the Court that he appeared only for Kunstler and not for Banks; for such reason, his signature added nothing to the pleading.

The Court, having made the foregoing review of said papers and of the status of the various individuals mentioned was, and still is, of the opinion that the papers in question presented nothing which would require the Court to take the action contemplated by 28 USC § 2243. In this connection, the Court further noted that although the petition purportedly attached, as Exhibit D, an affidavit submitted by Banks to the United States Court of Appeals for the Seventh Circuit, no such exhibit was in fact at-

tached. If attached, and if in fact verified by Banks, such exhibit might have met the requirements under 28 USC § 2242; on the other hand, it might have contained facts which would show on their face that Banks was not entitled to relief. This Court has simply not had the benefit of being able to consider such document.

On October 1, 1973, the defendant Banks appeared in open court in connection with the criminal case, accompanied by Kunstler and Barnhart. There was an extended colloquy in open court regarding the posture of the criminal case. At that time, neither Banks, Barnhart nor Kunstler presented or offered to present any motion, comment or inquiry regarding the status of the purported habeas corpus action. Obviously, an additional or amended pleading, properly verified by Banks, could have been filed that day, or indeed at any time since September 17, 1973.

On October 2, 1973, the said Barnhart, in his capacity as local counsel for Kunstler, inquired of the Court in chambers as to what disposition the Court proposed to make the purported habeas corpus proceeding. The Court advised Barnhart that it did not consider said petition sufficient to require any action, stating the various reasons heretofore set out in this memorandum. The Court further advised Barnhart that the bizarre method of causing Kunstler to file the petition "as one of relator's attorneys" at the very time when the question of such representation was the subject of vigorous litigation in a higher Court suggested that the habeas corpus proceeding was a mere sham or ploy designed to cause this Court indirectly to recognize Kunstler as Banks' attorney, and thus moot the proceeding then pending in the Court of Appeals.

This Court further advised Barnhart on October 2, 1973, that the Court would promptly issue a show cause order pursuant to 28 USC § 2243 if Mr. Banks would take the

extremely simple step of adopting Kunstler's petition as his own and verifying same. Barnhart purported to thank the Court for its advice and appeared to indicate that Banks would follow the Court's suggestion immediately.

Instead of following such simple procedure, which would have caused the Court to issue an immediate show cause order to the respondent, Mason Holley, Mr. Banks has curiously taken the circuitous route of filing a petition for a writ of mandamus in the United States Court of Appeals for the Seventh Circuit, asking that Court to direct the undersigned, as a judge of this Court, "to grant or otherwise act as provided by applicable law" upon the petition filed September 17, 1973. To "otherwise act," of course, would be merely to issue a show cause order to the respondent—a matter which would long since have been accomplished if Banks would address himself to this Court rather than to the Court of Appeals.

Having reviewed all of the foregoing facts and circumstances this date, the Court finds as a fact that the petition filed September 17, 1973, was a sham, the sole purpose of which was to attempt to moot consideration of this Court's ruling denying Kunstler leave to represent Banks *pro hac vice* by the Court of Appeals and by the Supreme Court of the United States. The Court further states its conclusion of law that said petition of September 17, 1973, is a legal nullity because it is not verified by Banks nor by anyone authorized to act in his behalf within the meaning of 28 USC § 2242.

It is therefore considered that no action will be taken by this Court on said document pursuant to 28 USC § 2243, unless the said Arthur Chester Banks determines to act upon the suggestion of the Court as made to the said Barnhart, all as above related, within fifteen (15) days of this date. In the absence of such action within the time

fixed, the Clerk is directed to remove this matter from the active docket of the Court as improvidently filed.

All of which is considered and ordered by the Court this 15th day of October, 1973.

S. Hugh Dillin, *Judge*

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Arthur C. Banks, U.S. Penitentiary,
Terre Haute, Indiana

Information copies to:

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MAR 5 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

73-841

HON. CALE J. HOLDER,
United States District Judge for the Southern District of Indiana,
Petitioner,

v.

ARTHUR BANKS,
Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

73-841

HON. CALE J. HOLDER,
United States District Judge for the Southern District of Indiana,
Petitioner,

v.

ARTHUR BANKS,
Respondent.

BRIEF OF PETITIONER

Petitioner, the Hon. Cale J. Holder, Judge of the United States District Court for the Southern District of Indiana, respectfully petitions this Court to review the decision of the United States Court of Appeals in an original action for mandamus captioned Arthur Banks v. Hon. Cale J. Holder, Cause No. 73-1332.

JURISDICTION

The Court of Appeals rendered its original decision on May 17, 1973 (Exhibit A to Petition For Writ of Certiorari) and thereafter on Oct. 1, 1973, by a vote of four to three, denied a petition for hearing. (Exhibit B to Petition

For Writ of Certiorari). Neither decision is yet reported. On Oct. 5, 1973 Mr. Justice Rehnquist stayed the enforcement and effectiveness of the decision of the Court of Appeals. On Oct. 26, 1973 Mr. Justice Rehnquist granted petitioner an extension of time within which to file a petition for writ of certiorari to and including November 29, 1973. On November 28, 1973 petitioner filed his petition for writ of certiorari. On January 21, 1974 this Court granted the petition. This Court has jurisdiction to review the decisions of the Court of Appeals pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, COURT RULES AND ETHICAL STANDARDS INVOLVED

Amendment I to the United States Constitution:

> "Religious and political freedom.—Congress shall make no law . . . abridging the freedom of speech. . ."

Amendment 6 to the United States Constitution:

> "Rights of the accused. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed . . . and to have the assistance of counsel for his defense."

Rules of the United States District Court for the Southern District of Indiana:

> Rule 1(f). "The Canons of Ethics of the American Bar Association as from time to time existing shall be the standards of conduct for members of the Southern Indiana District Bar."
>
> Rule 27. "It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with

a fair trial or otherwise prejudice the due administration of justice."

"From the time of arrest, issuance of an arrest warrant or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement for dissemination by any means of public communication, relating to that matter and concerning:

"(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

"(2) the existence of contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

"(3) the performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

"(4) the identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

"(5) the possibility of a plea of guilty to the offense charged or a lesser offense;

"(6) any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case."

American Bar Association's Code of Professional Responsibility and Canons of Judicial Ethics:

DR 1-102(A). "A lawyer shall not . . . (5) Engage in conduct that is prejudicial to the administration of justice."

EC 7-33. "A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an imparital tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established."

EC 7-36. "Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears.

DR 7-107. "(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

"(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

"(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

"(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

"(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

"(5) The identity, testimony, or credibility of a prospective witness.

"(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case."

QUESTIONS PRESENTED

1. The scope of a trial court's discretionary power to deny a criminal defendant's request that he be represented *pro hac vice* by an attorney not a member of that Court's bar and in particular

(a) whether delays in the arraignment and apparent delays in future proceedings attributable to chosen counsel warrants denial of the request.

(b) whether an attorney's violation of the rules of the Court and of the ethical standards of the legal profession warrants denial of the request, and

(c) whether such a denial is forbidden by the Sixth Amendment to the United States Constitution.

2. (a) whether the court rules and ethical standards which forbid an attorney in a criminal case from making extrajudicial statements on specific subjects for public dissemination are compatible with the First Amendment to the United States Constitution.

(b) whether an attorney's deliberate incitation of sympathizers to demonstrate and pack the courtroom was protected by the First Amendment to the United States Constitution.

STATEMENT OF THE CASE

This case commenced with the return of an indictment against respondent in the United States District Court for the Southern District of Indiana on December 14, 1972. Respondent, an inmate of the federal penitentiary at Terre Haute, Indiana, was charged with assaulting a guard at that institution. At the first arraignment held on December 20, 1972, respondent appeared and indicated that his counsel would be William M. Kunstler, having been engaged approximately one month previously. Because of Mr. Kunstler's absence at that hearing, the arraignment was continued at respondent's request. On January 2, 1973, another arraignment was attempted, but because of Mr. Kunstler's absence, the arraignment was continued again at respondent's request. On February 2, 1973, the respondent again came before the court for arraignment, but again Mr. Kunstler did not appear. The court then entered a plea of not guilty for respondent. On March 21, 1973, Mr. Kunstler filed an application for leave to appear on behalf of respondent. In response to a request by the government for a hearing on the application, petitioner held a hearing on April 1, 1973. At that hearing it was shown that Mr. Kunstler had on various occasions since February 9, 1973 (the date on which Mr. Kunstler states he became counsel for respondent) made in Terre Haute or Indianapolis the following statements to public audiences or to the news media concerning the pending criminal case:

> (1) "that it was his client Banks who was assaulted by the prison guards;
>
> (2) "that the charge against Banks is purely retaliative . . . a cheap little way of getting back at him for being a trouble-maker";
>
> (3) "that Mr. Kunstler was certain he (Banks) was brutalized by the guards,

(4) "that it is a common cover-up tactic in order to protect the guards to file charges against Banks;

(5) "that all the evidence is inside the prison walls, under the control of the authorities who brought the charges against Banks;

(6) "the word of a guard is always taken over that of an inmate;

(7) "that Banks got into all this trouble because he doesn't act like most of the black inmates who 'Uncle Tom' it inside;

(8) "that there is a lot of antagonism against Banks because his wife is white;

(9) "that Attorney Kunstler urged students at Terre Haute to organize demonstrations in support of Banks and to fill the courtroom with sympathetic spectators during the trial;

(10) "That 'Anything they can do to call attention to the trial will be welcomed. I am not asking them to blow up the courthouse but that would certainly draw attention.' (Exhibit G to Government's Motion to Correct)

(11) "that Mr. Kunstler was quoted as being proud to be associated with Mr. Banks as he represents the finest of the pacifist anti-war movement; (Exhibit A to Government's Answer)

(12) "that Mr. Banks is a black man who was sent to jail for his beliefs in the value of human life and the dignity of all people at a time when many who have much more to defend chose alternatives to incarceration;

(13) "that Mr. Kunstler sees this indictment as a political attack by the prison administration on an individual who firmly stands for his beliefs, who is articulate and a spokesman for "Black Liberation and Pacificism," and therefore a threat to the smooth-running oppression that is so much a part of prison life in this country today;

(14) "that Mr. Kunstler is quoted as saying, 'This case typifies the strategy used to quiet dissent among inmates, for the case is such that due process is virtually an impossibility.'

(15) "The moment he [Banks] went into prison he was doomed.' " (Exhibit H to Governments Motion to Correct)

(16) " 'the only successful way to defend your self against charges such as those against Banks is by creating a a [*sic*] complete support group around the trial, that includes demonstrations and making sure every court session has a full house and listing celebrities who are interested in the case . . . and Kunstler [*sic*] had a comment concerning draft evaders and the granting of amnesty. . . .' " (Exhibit I to Government's Motion to Correct)

Mr. Kunstler did not dispute these statements and expressed his right to make them and an intention to continue. Petitioner concluded that such public statements violated the rules of court and ethical standards of the legal profession concerning pretrial publicity, that such violations and Mr. Kunstler's indication that he would continue threatened a trial fair to both defendant and the public and the orderly administration of justice and on that basis together with a concern for Mr. Kunstler's delays in appearing for respondent denied Mr. Kunstler leave to appear. Opinion attached as Exhibit C to Petition for Writ of Certiorari. Thereafter, respondent brought the original action for mandamus in the Circuit Court of Appeals for the Seventh Circuit. While that action was pending Mr. Kunstler kept his promise to make more public statements concerning the case. At a promoted speech at the Indiana University Law School in Indianapolis Mr. Kunstler made the following statements:

"* * * I was denied in two other states the right to represent defendants in criminal cases; * * * The other was in the Circuit Court in Dade County, Florida, in

Miami, where a judge by the name of Murray Goodman refused to let me represent a young man named Alton Forbes, who is one of the defendants in the Vietnam Veterans Against the War conspiracy case to disrupt the Republican National Convention which will be starting in . . . very shortly. Some of you may have read that Judge Murray Goodman was indicted two weeks ago with the Mayor of Miami Beach for accepting bribes. . . . I don't raise that as the background of every one of the judges, though it wouldn't totally surprise me if that was the case, but I indicate that it is rather interesting that those who preach the righteous gospel so vigorously like Judge Murray Goodman and Al Capp to name two, are so frequently caught in the most horrendous of situations. Those of you who, that aren't familiar with Al Capp might be reminded that he just pleaded guilty to attempting to force young women to commit what the law so euphemistically describes as an act against nature . . . at a motel in Eau Claire, Wisconsin. That is another matter.

". . . On a personal level I was deeply shocked by it because it [the pending case involving respondent Banks] was the first time in any federal case that I ever heard a United States District Judge deny an attorney the right to represent the person who desires his services. It was done in a cold and crass and criminal manner by a judge [Holder] who, in doing so, committed a crime. He violated the civil rights of a defendant. Under any ordinary set of circumstances, if the law was just and honest, he should be indicted for what he did. He violated his oath of office; he violated his oath as a member of his profession, and he violated every tenet of human decency in doing it. * * * "

"Write a letter to the judge, write a letter to the newspapers. Picket the courthouse, do anything that will contribute to the issue."

"There is a committee here for Arthur Banks and anyone that wants any information about that can reach that committee through the law offices of Barnhart and Allison." (Exhibits C & D to Government's Answer)

Following the speech a taped interview was held with an Indianapolis radio station during which Mr. Kunstler made the following comments:

"* * * The Judge here, Judge Holder, has said that he is not going to permit me to appear in his Court, which means that I can't represent Arthur Banks, which means that I am disbarred as far as this Court is concerned, and he is doing it for no good reason whatsoever, other than his own innate prejudice against me. * * *"

". . . it would seem to me any lawyer worth his or her salt would be writing to the Editor, writing to the Bar Association, writing to the Judge, writing to the Court of Appeals for the Seventh Circuit, and saying, 'Look here, we may or may not agree with William M. Kunstler, but that is not the issue before us. The issue is, are we going to rape the Constitution by allowing a Federal Judge to do what the Constitution says he should never do, and that's to deprive a defendant of his right to an attorney of his choice.' "

"I don't think anyone should respect the law, not certainly as it's practiced in America."

"* * * It [the law] is neither fair nor just, because it's manipulated and utilized. . . . And in its own procedures and practices it's unfair as well; built in, deliberately, I think, into the system. I think the best use is to distrust it, strip it of all its mysticism; to demonstrate, to fill courtrooms, to confront it. * * *

We would think nothing peculiar at all about picketing Congress or picketing the Whie House—why not picketing the Court? * * *

"I think that the only answer in all of these systems, is confrontation. Physical confrontation. * * *" (Exhibit I to Government's Answer)

While the mandamus action below was being considered on a petition for rehearing, and during which the court had issued a stay of its original order, the effect of such stay being to deny Mr. Kunstler the right to represent respond-

ent, Mr. Kunstler nevertheless attempted to initiate a habeas corpus action on behalf of respondent. That suit was assigned to the Hon. S. Hugh Dillin, another judge of the United States District Court for the Southern District of Indiana. Judge Dillin noted that the petition was not signed by respondent but only by Mr. Kunstler. Judge Dillin, noting other defects in the petition and being apprised of the pending proceedings in the Court of Appeals, concluded that the petition was nothing more than a sham proceeding by Mr. Kunstler to get the district court to recognize him as counsel for the respondent. See opinion attached as Exhibit D to Petition For Writ of Certiorari. Then on October 6, 1973, after Mr. Justice Rehnquist had granted a stay of the Court of Appeals' decision, the effect of such stay again being to deny Mr. Kunstler the right to represent respondent, Mr. Kunstler filed another mandamus action, this time against Judge Dillin. True to form Mr. Kunstler then called a press conference before an Indianapolis radio station during which he made the following statements:

> "'• • • I think it's a frightful thing that has been done to him [Banks] by the Government of the United States, the American Bar Association, 21 of the so-called prestigious Indiana lawyers who filed against him, and a United States district judge by the name of Dillin, who is being sought to be impeached because of his integration decree in Indiana and while I'd oppose his impeachment on those grounds, I would wholeheartedly support it for what he has done to this black man in Terre Haute. He has violated his oath of office and he has denied this man the most fundamental of rights. He has ignored his habeas corpus. He has succeeded in stalling his case long enough for the Government to catch up with Justice Rehnquist in Washington and to put his case in limbo where it cannot move. And those who say to American citizens, trust in the system and do not adopt alternative methods, may some day

remember this case along with others when people refuse to trust the system. It's about the worst instance in my career of some 25 years that I have ever seen. Judge Hoffman pales into insignificance when you compare him to Judge Dillin, because Judge Hoffman was at least honest. Judge Dillin is a fraud. And, I think he has done a [sic] enormous injustice to Arthur Banks and he probably has done it because he is trying to avoid the anger of the citizens of Indiana for his integration decree and so he has decided to destroy Arthur Banks in order to get back on the establishment's bandwagon. It's a very sad and desperate thing, I think, that a Federal judge will violate his oath of office in this fashion, but I gess [sic] it's not unexpected since the President of the United States does it regularly.

" 'Well, in this case, it's an alliance between the United States government, the American Bar Association, the Indiana Bar or what they call prestigious members of the Indiana Bar and the Federal Judges in this District, Judge Holder, Judge Dillin and others. And it's a vicious cycle, one feeds into the other. It's a criminal conspiracy to subvert the Constitution. And these men like Dillin and Holder are criminals and it's just too bad that American people don't recognize who the real criminals are in their midst. They are not in Terre Haute prison. They sit in White Houses and State Houses and they sit on benches and they destroy human beings. And I don't know what should be done to them. I have several ideas.' " (Exhibit B to Answer of Hon. S. Hugh Dillin)

Thereafter the Court of Appeals denied the application for mandamus against Judge Dillin.

SUMMARY OF ARGUMENT

Leave to unadmitted counsel to appear pro hac vice in a criminal proceeding may be denied where that counsel is responsible for unreasonable delays in the proceedings and where that counsel violates and expresses an inten-

tion to continue to violate court rules and ethical standards proscribing extra judicial statements that have the reasonable likelihood of prejudicing the rights of the defendant or the government to a fair trial and the public's interest in the orderly administration of justice. Such rules of court and ethical standards are compatible with the first amendment.

I. THE SIXTH AMENDMENT DOES NOT IMPAIR THE AUTHORITY OF A TRIAL COURT TO DENY LEAVE TO UNADMITTED COUNSEL TO APPEAR *PRO HAC VICE* BECAUSE OF CONDUCT CONTRARY TO THE COURT'S RULES AND THE ETHICAL STANDARDS OF THE PROFESSION.

The Sixth Amendment declares that an accused enjoys the right "to have the assistance of counsel for his defense." However, this right is not absolute. "The constitutional mandate is satisfied so long as the accused is afforded a fair or reasonable opportunity to obtain particular counsel, and so long as there is no *arbitrary* action prohibiting the effective use of such counsel. *The conclusion becomes inescapable, therefore, that although the right to counsel is absolute, there is no absolute right to a particular counsel." United States ex rel. Carey* v. *Rundle,* 409 F.2d 1210, 1215 (3rd Cir. 1969), *cert. denied,* 397 U.S. 946 (1970). (Emphasis supplied.)

Since the right to counsel means the right to be represented by a member of the bar, it does not extend to persons not admitted to practice or who have been excluded from practice permanently or temporarily. Thus the Sixth Amendment does not give an accused the right to select an attorney previously admitted in the jurisdiction whose right to practice has been suspended for unethical conduct, and this would apply to exclusion for misconduct in the particular case as well as to a general suspension.

It has long been the general practice of courts to allow foreign counsel to appear *pro hac vice.*

That is far from saying, however, that a defendant has a constitutional right to be represented by foreign counsel. "It is well settled that permission to a nonresident attorney, who has not been admitted to practice in a court, to appear *pro hac vice* in a case there pending is not a right but a privilege, the granting of which is a matter of grace resting in the sound discretion of the presiding judge." *Thomas* v. *Cassidy*, 249 F.2d 91, 92 (4th Cir. 1957), *cert. denied sub nom., Fitzgerald* v. *Cassidy*, 355 U.S. 958 (1958), in which the nonresident lawyer engaged in unspecified "unlawyerlike" conduct. See also *People of the State of New York* v. *Epton*, 248 F.Supp. 276, 277 (S.D. N.Y. 1965); *In re Henry*, 40 N.Y. 560 (1869); *Manning* v. *Roanoke & T. R. Co.*, 122 N.C. 824, 28 S.E. 963 (1898); *Youmans* v. *Hanna*, 35 N.D. 479, 160 N.W. 705 (1916); *In re Pierce*, 189 Wis. 441, 207 N.W. 966 (1926).

Nevertheless, the exercise of discretion must be reasonable and not arbitrary. As a practical matter, since it is desirable to allow a defendant to be represented by an attorney of his choice, this means that a defendant's request to be represented by outside counsel, in association with local counsel, will be granted unless good cause for denial appears.

However, the question of whether a defendant has a right to a lawyer not a member of the local bar has seldom been presented in constitutional terms. Indeed, the powers of state and federal courts to require that attorneys practicing before them be admitted to their bars would be greatly impaired, both in principle and practice, if parties had a constitutional right to be represented by any attorney admitted anywhere.

The Third Circuit, speaking through Circuit Judge Goodrich, in *Cooper* v. *Hutchinson,* 184 F.2d 119, 122 (3rd Cir. 1950), found such a proposition "startling", and observed (p. 122):

> "The argument for the appellants thus necessarily goes far beyond an insistence that a man charged with a capital crime in a state court must have the assistance of counsel. These appellants have had the service of counsel all the way through the prosecution of the charges against them. The narrower question here is the extent to which an accused person's choice of counsel is a constitutional right. The argument insists that there is a constitutional right, at least in a capital case, to whatever counsel an accused person pleases to have. If that counsel is not a member of the bar of the state where the prosecution is being conducted, still, the argument runs, the accused may effectively choose him just as freely as he could choose a lawyer admitted to practice locally. The person chosen by the accused may then insist upon conducting the defense in the local courts. Control by the states over the persons who may be licensed to practice law in their courts would thus be greatly diminished in every capital criminal prosecution where the accused desires counsel from somewhere else.
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> "The length to which this argument takes one is startling. It has always been thought that the license to practice law is limited, except as a matter of grace, to persons who had fulfilled the local requirements for practice. The Civil Rights Act provision relied upon here is a powerful piece of legislation and its power has ben recognized by this Court. But we have never been asked to take it this far. The Bergamo case, which has been pressed upon us, is not conclusive here, for in that case we were only laying down qualifications for the trial of cases in the federal courts of this circuit."

Since outside counsel had been already admitted *pro hac vice* in the *Cooper* case, the Court found it necessary to

hold only that a right thus granted, "may not, without cause, be taken away", without passing upon the "broad question" of the right of outside counsel to appear in the first instance.*

The argument that a criminal defendant has a constitutional right to an out of state attorney was recently rejected by the New Jersey Supreme Court in *State* v. *Kavanaugh*, 52 N.J. 7, 243 A.2d 225, 231 (1968), *cert. denied, sub nom., Matzner* v. *New Jersey*, 393 U.S. 924 (1968), with the Third Circuit concurring:**

> "Mr. Bailey's clients urge a constitutional right to select an attorney who is not a member of our Bar. So long as the Bar of our State is able, willing and free to provide effective counsel, there is no such right. Thomas v. Cassidy, 249 F.2d 91 (4 Cir. 1957), certiorari denied, Fitzgerald v. Cassidy, 355 U.S. 958, 78 S.Ct. 544, 2 L.Ed2d 533 (1958); People of State of New York v. Epton, 248 F.Supp. 276 (S.D. N.Y. 1965); see Parker v. Parker, 97 So.2d 136 (Dist. Ct. App. Fla. 1957); Johnson v. DiGiovanni, 347 Mich. 118, 78 N.W.2d 560, 565 (Sup. Ct. 1956). This is not a situation in which no member of the local Bar will act. See Lefton v. City of Hattiesburg, Mississippi, 333 F.2d 280 (5 Cir. 1964). There is no dearth of competent attorneys in our State ready to meet the constitutional right to counsel. There is nothing provincial about the requirement for admis-

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* *In United States* v. *Bergamo*, 154 F.2d 31, 35 (3rd Cir., 1946), where there was no suggestion of improper conduct on the part of the attorneys selected by the defendants, the same Circuit had said "To hold that defendants in a criminal trial may not be defended by out-of-the-district counsel selected by them is to vitiate the guarantees of the Sixth Amendment." The constitutional basis for this dictum was repudiated in the *Cooper* opinion quoted in the text, written by Circuit Judge Goodrich who had been a member of the panel in *Bergamo*.

** The United States District Court refused to overturn the decision of the New Jersey Supreme Court saying that it could "add nothing" to that court's "comprehensive and well reasoned decision." *Matzner* v. *Brown*, 288 F.Supp. 612 (D. N.J.), aff'd, 410 F.2d 1376 (3rd Cir., 1969), cert. denied, 296 U.S. 1015 (1970).

sion to practice in the courts of a State. The courts of every jurisdiction must have control of practice before them as an 'incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct insullied.' Cohen v. Hurley, 366 U.S. 117, 123-124, 81 S.Ct. 954, 958, 6 L.Ed.2d 156, 162 (1961)."

Occasional statements that a defendant's right "to be heard through his own counsel was unqualified" (*Chandler* v. *Fretag*, 348 U.S. 3, 9 (1954)) and that the right to counsel of one's own choice is "absolute and no showing of special circumstances is necessary" (*Reickhauer* v. *Cunningham*, 299 F.2d 170, 172 (4th Cir. 1962)) were made in cases in which defendant was allowed no effective legal representation and which did not in any way involve a question of non-local counsel or the failure of selected counsel to comply with court rules or ethical standards. And there are cases, such as *Bergamo* and *Magee* v. *Superior Court*, 8 Cal.3d 949, 106 Cal. Rptr. 647, 506 P.2d 1023 (1973), holding that leave to appear *pro hac vice* may not be denied without good reason; neither case involved any charge of unethical conduct.*

As the *Kavanaugh* and *Rundle* cases (all *supra*) show, at least two factors have been recognized as good cause for denying retained counsel, both in and out of state, leave to appear. One is the inability of such counsel to serve without unduly delaying the trial. "Desirable as it is that a defendant obtain private counsel of his own choice, that goal must be weighed and balanced against an equally desirable public need for the efficient and effec-

* In the *Magee* opinion the California court stated that the defendant's choice of retained counsel "can constitutionally be forced to yield only when it will result in significant prejudice to the defendant himself or in a *disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.*" 506 P.2d at 1025 (Emphasis supplied.).

tive administration of criminal justice." *United States ex re. Carey* v. *Rundle,* 409 F.2d 1210, 1214 (3rd Cir. 1969); *United States V. Hampton,* 457 F.2d 299, 301 (7th Cir.), *cert. denied,* 409 U.S. 856 (1972); *United States* v. *Cozzi,* 354 F.2d 637, 639 (7th Cir.), *cert. denied,* 383 U.S. 911 (1966); *United States* v. *DiStephano,* 464 F.2d 845, 846 n. 1 (2d Cir., 1972); *United States* v. *Pigford,* 461 F.2d 648 (4th Cir. 1972).

In the present case, Mr. Kunstler was not present at the first arraignment on December 14, 1972, although respondent represented to the court that Mr. Kunstler had been retained approximately one month previously. Nor was Mr. Kunstler present at the second arraignment on January 2, 1973, nor at the third arraignment on February 2, 1973. Contrary to respondent's statement that Mr. Kunstler had been retained in November, 1972, Mr. Kunstler states that he first became counsel for respondent on February 9, 1973. Although Mr. Kunstler was in Terre Haute on that date, during which he made a public speech concerning the respondent, Mr. Kunstler did not then file an application for leave to appear for respondent, but waited until March 21, 1973. When petitioner, who was near completing the session of court in the Terre Haute Division,* attempted to schedule Mr. Kunstler's motion for hearing, Mr. Kunstler represented to petitioner's clerk and staff that he was unavail-

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* Pursuant to 28 U.S.C. §§ 139-141, the United States District Court for the Southern District of Indiana has adopted a rule providing:

> "A trial session of this Court shall be commenced at the United States Courthouse, Terre Haute, Indiana, in the Terre Haute Division of this district on the 3d Monday of September, the 3d Monday of January, and the 3d Monday of May in each year."

The Court also by general order has provided:

> "Alternately and in rotation, each judge other than the chief judge, shall preside over the regular sessions of court to be held in the Terre Haute, Evansville, and New Albany divisions. Such sessions shall be held as designated herein.
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> "Each judge presiding in these divisions shall have the authority to deal with all pending cases during the session of court in the same manner as though the cases were assigned to him. Upon the adjourn-

able at the scheduled time and had many other more important matters to attend to. Petitioner finally scheduled the hearing for April 1, 1973, a Sunday which was the first date Mr. Kunstler indicated his availability and was after petitioner had concluded all other matters on the calendar for that session of court in Terre Haute. Petitioner found, and it is submitted appropriately so on the basis of the foregoing authorities, that the delays attributable to Mr. Kunstler was sufficient reason to deny his motion for leave to appear. At a minimum such delays alone called for serious assessment, but they were only one facet of Mr. Kunstler's conduct that led to petitioner's conclusion to deny the motion for leave to appear.

The second factor recognized as good cause for denying retained counsel is whether the outside lawyer has engaged in "unlawyerlike," unethical or illegal conduct in relation to the particular case. So far as petitioner has been able to ascertain, *every* court which has mentioned lawyers' misbehavior, whether by way of holding or dictum—and fortunately there are few such cases—has indicated that it is a legitimate ground for excluding an outside attorney from a case. Holdings: *Thomas* v. *Cassidy*, *State* v. *Kavanaugh*, *Matzner* v. *Brown*, all *supra*; *Parker* v. *Parker*, 97 So.2d 136 (Fla. Ct. App. 1957). Dicta: *Sanders* v. *Russell*, 401 F.2d 241 (5th Cir. 1968); *Spanos* v. *Skouras Theatres Corp.*, 364 F.2d 161, 168 (2d Cir. en banc, 1966), *cert. denied*, 385 U.S. 987 (1966); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Jackson*, 235 F.2d 390, 393 (10th Cir. 1956).

Petitioner submits there is no better reason to deny a lawyer leave to appear *pro hac vice* than his refusal to abide by the rules of the court and the ethical standards

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ment of court in the above-named divisions, any case remaining on the trial calendar over which a judge assumed jurisdiction for the session shall automatically revert back to the docket of the judge to whom the case was originally assigned. • • •"

of the legal profession, which in this case coincide. Particularly must this be true when the rules and standards in question are designed to insure a fair trial and when the subsequent statements and acts of the lawyer manifest an intention to continue to engage in the same kind of conduct. Indeed, unless the Rule, the Code and the canons are unconstitutional, this would seem to be the most compelling reason for not allowing outside counsel to appear.

In *Kavanaugh,* which also involved public statements by out-of-state counsel, the Supreme Court of New Jersey recently ordered F. Lee Bailey removed as counsel (243 A.2d at 231):

> "It is not easy for us to oust counsel of a client's choice. But the misbehavior here is so gross that we cannot risk more of it. We have searched for some evidence that Mr. Bailey would stay in bounds, but unhappily we cannot find it. There must be a fair trial, *both for a defendant and for the State.* The conduct here involved invaded that interest. But of even greater moment than the interest of the immediate parties is the interest of the public in the integrity of the judicial process. The antics here involved spill over upon the right of all litigants to expect justice in the courtroom and in accordance with the rules of law. We have weighed again and again whether that larger interest could be served by a subsequent disciplinary proceeding alone, and we are constrained to find that it would not. We must therefore affirm the order." (Emphasis supplied.)

Kavanaugh and its campanion case in the federal courts (*Matzner* v. *Brown supra,* p. 16) were cases in which "a defense counsel's course of conduct involving pretrial publicity has been held to override the defendant's Sixth Amendment right to counsel of his own choosing." Compare the Court of Appeals order of May 17, 1973, Exhibit A to the Petition For Writ Of Certiorari.

Standard 3.5 of the ABA Project on Standards for Criminal Justice, *Standards Relating to the Function of the*

Trial Judge 1972 (pp. 45-46)* recognizes both that a defendant's request to be represented by an outside attorney should be given "great deference" and that permission may be denied an attorney who misbehaves:

> "3.5 Attorneys from other jurisdictions.
>
> "If an attorney who is not admitted to practice in the jurisdiction of the court petitions for permission to represent a defendant, the trial judge may
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> "(a) deny such permission if the attorney has been held in contempt of court or otherwise formally disciplined for courtroom misconduct, or if it appears by reliable evidence that he has engaged in courtroom misconduct sufficient to warrant disciplinary action;"

Although subparagraph (a) specifically refers only to "courtroom misconduct", the Committee's Commentary makes it clear that this enumeration only "sets forth some grounds (by no means exclusive) upon which a judge might justifiably decline to permit counsel to be specially admitted." The Commentary states (p. 46):

> "Great deference should be given to the request of a defendant to be represented by counsel of his choice. Yet there is no absolute right to be represented by counsel who is not admitted to practice in the jurisdiction of the court. Subparagraph (a) sets forth *some grounds (by no means exclusive) upon which a judge might justifiably decline to permit counsel to be specially admitted;* and subparagraph (b) suggests some conditions which might be imposed, with the objective of minimizing the risk that a trial may be aborted by misconduct of counsel. *No rigid rules are appropriate, however, and each application should be considered on its own circumstances.* The trial judge should apply the law of the forum in determining whether this misconduct brought to his attention would warrant disciplinary action." (Empasis supplied.)

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* These standards were recommended by the Advisory Committee on the Judge's Function and approved by the ABA House of Delegates in August, 1972.

A trial judge may properly regard out-of-court misconduct likely to interfere with a fair trial as grounds for denying leave to appear specially.

Of course, refusal to comply with the rules of court and ethical standards is also good cause for denying admission to the bar in the first instance, and for suspension or disbarment once an attorney has been admitted. The right of an accused who wishes to be represented by a lawyer not admitted to the local bar can be no greater than that of a defendant with local counsel. Since special permission to appear must be granted in such cases, the Court must have at least as broad an authority to deny leave as would a court to which the attorney was admitted; indeed, the discretionary character of the application for leave suggests that the authority in dealing with such applications should be broader.

One reason is the lesser ability of a court to discipline or control attorneys not members of its bar. Some attorneys may feel less impelled to act respectfully or otherwise comply with ethical standards in courts in which they do not have to continue to practice. Compare *State* v. *Kavanaugh*, *supra*. Another reason is that disbarment or suspension is a much more drastic sanction than exclusion from a single case in a court in which the attorney does not generally practice.

Neither the Sixth Amendment nor any other principle of law guarantees a defendant the right to be represented by counsel not admitted to the local bar who has violated and threatens to violate the ethical standards embodied in the Court's rules and the Code of Professional Responsibility.

The critical issue remains as to whether the rules of ethical considerations which condemn Mr. Kunstler's conduct are incompatible with the First Amendment.

II. THE ETHICAL STANDARDS HERE IN ISSUE ARE COMPATIBLE WITH THE FIRST AMENDMENT.

A. The Rules Against Pretrial Publicity by Counsel in a Criminal Case.

Mr. Kunstler contends that the portions of Rule 27 and DR 7-107 of the Code of Professional Responsibility here involved are "facially unconstitutional." See "Response to Undated Entry" (p. 6) filed in the Court of Appeals April 11, 1973, and "Brief In Opposition to Petition for Certiorari" (pp. 14, 16) filed in this Court on December 27, 1973.

It may be assumed that the First Amendment would preclude a prohibition against similar statements by the press or other persons not counsel for parties to the litigation. The test would then be whether there was "a serious and imminent threat to the administration of justice." *Craig* v. *Harney,* 331 U.S. 367, 373 (1947); *Bridges* v. *California,* 314 U.S. 252, 263 (1941); *Pennekamp* v. *Florida,* 328 U.S. 331 (1946); *Wood* v. *Georgia,* 370 U.S. 375, 384-385 (1962). Those cases impose a heavy burden which the prohibitor of such statements must satisfy. "The substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Bridges, supra,* at 263, quoted in *Wood,* at 384. "To warrant a sanction '[t]he fires which [the expression] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." *Craig* v. *Harney,* at 376, quoted in *Wood* at 385.

This test, petitioner submits, is not applicable to statements by lawyers in relation to pending litigation. The ethical standards of the profession, embodied for many years in the Canons of Professional Ethics and now in the

Code of Professional Responsibility, have long disapproved of public statements by trial counsel which might influence the outcome of a trial. The philosophy underlying this limitation is well stated in EC 7-33 of the present Code, *supra*, p. 4.

Former Canon 20 was designed to deal with the problem. It provided:

> "20. *Newspaper Discussion of Pending Litigation*
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> "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement."

In 1964 the Supreme Court of New Jersey relied on this Canon as prohibiting "statements to news media by prosecuting attorneys" which had "the capacity to interfere with a fair trial." *State* v. *Van Duyne*, 43 N.J. 368, 204 A.2d 841, 852, 11 A.L.R.3d 1086, 1102 (1964). The same ban, the New Jersey Supreme Court continued (204 A.2d at 852):

> ". . . applies as well to defense counsel. The right of the State to a fair trial cannot be impeded or diluted by out-of-court assertions by him to news media on the subject of his client's innocence. The courtroom is the place to settle the issue and comments before or during the trial which have the capacity to influence potential or actual jurors to the possible prejudice of the State are impermissible."

In *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), this Court faced up to the difficulties in reconciling the constitutional guarantees of a fair trial and a free press. The Court

there reversed Dr. Sheppard's conviction for murder on the ground that "prejudicial news items [traceable] to the prosecution, as well as the defense" (p. 361) deprived the defendant of a fair trial. The Court went further, however, to suggest means whereby the courts could lawfully adopt "remedial measures that will prevent the prejudice at its inception" (p. 363). In strong, indeed mandatory language, this Court declared (p. 363):

> ". . . The courts *must* take such steps by *rule and regulation* that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. *Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is high censurable and worthy of disciplinary measures.*" (Emphasis supplied.)

With respect to extrajudicial disclosures by counsel, the Court was quite explicit, in language from which Rule 27 and DR 7-107 were plainly drawn. The Court said, citing the *Van Duyne* decision of the New Jersey Supreme Court and former Canon 20 (p. 361):

> "More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie deterctor tests; any statement made by Sheppard to officials; the *identity of prospective witnesses or their probable tetimony; any belief in guilt or innocence; or like statements concerning the merits of the case.* See *State* v. *Van Duyne*, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements. . . ." (Emphasis supplied.)

Subparagraphs (5) and (6) of DR 7-107(B) and (4) and (6) of the third paragraph of Rule 27, *supra*, pp. 2, 3, 4, 5, the provisions most directly involved here, were obviously derived from the emphasized references in the above passage.

The impact of these pronouncements in the *Sheppard* case is described in the Report of the Kaufman Committee of the Judicial Conference on the *Operation of the Jury System on the "Free Press-Fair Trial" Issue*, published in 45 F.R.D. 391 (1969).

> "It was in Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507 (1966), that the Supreme Court laid down a mandate to the courts to deal with the problems caused by the impact of publicity on the jury system. . . . (p. 395.)
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> • • •
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> "The adjuration of Sheppard v. Maxwell has given impetus to one of the most searching debates in recent legal history as to methods of solving the problems of fair trial and free press. In December 1966, the American Bar Association's Advisory Committee on Fair Trial and Free Press under the Chairmanship of Justice Paul C. Reardon of the Massachusetts Supreme Judicial Court released a tentative draft of its report. This report, the product of more than 20 months of study and labor by the Committee and its Reporter, Professor David L. Shapiro of the Harvard Law School, contains specific recommendations on how the impact of publicity on the administration of criminal justice can be controlled. . . ." (p. 397.)

The Reardon Committee's proposal was approved by the American Bar Association in 1968, and subsequently incorporated in DR 7-107 of the Code of Professional Responsibility, approved by the American Bar Association in 1970.

The Kaufman report was the work of a committee of the Judicial Conference of the United States headed by Cir-

cuit Judge Kaufman of the Second Circuit and a subcommittee chaired by District Judge Gignoux of Maine.* The report stated (45 F.R.D. at 407);

> "The Committee is recommending the adoption in substance of the proposed Canon as it appears in Section 1.1 of the Proposed Final Draft of the Reardon Report. In the interest of establishing a uniform standard of conduct for attorneys in criminal cases in both the state and the federal courts throughout the country, the Committee feels that there is merit in adopting in substance the formulation proposed to be included in the American Bar Association's Code of Professional Responsibility.
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> • • •
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> "The Committee recommends action in three major areas. First, it feels that each United States District Court has the power and the duty to control the release of prejudicial information by attorneys who are members of the bar of that court, and it recommends action by local rule to restrict the release of such information on penalty of disciplinary action. (p. 401.)
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> ". . . At its February 1968 session, the Judicial Conference of the United States agreed to accept this report for study, and to that end *directed that it be circulated to all Federal judges with a request that their comments and suggestions be communicated to the Committee no later than July 1, 1968.* The *individual and collective opinions* of federal judges reported to the July 18th meeting of the Committee *overwhelmingly reflected general satisfaction* with all recommendations of the report. . . ." (p. 400.) (Emphasis supplied.)

"The Kaufman Committee Report was subsequently adopted by the Judicial Conference of the United States and implemented by Local 'Free-Press—Fair Trial' Rules

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* The committee was composed of three circuit judges and nine district judges.

promulgated by each District Court." *United States* v. *Dickinson*, 465 F.2d 496, 505 (5th Cir. 1972).

The Dickinson opinion continued:

> "• • • The Report and the Local Rules embodying it, however, must be viewed in light of the historically delicate balance the recommendations sought so zealously to preserve. Painstakingly harmonizing history with contemporary realities, freedom of the press with fundamental fairness of trials, the Kaufman Committee explored every aspect of the problem and its Report synthesizes all relevant considerations. The result is a catalogue of explicit proposals, *most taken directly from the Sheppard opinion*, inventorying the tools available to the trial Judge in discharging his affirmative duty to protect the accused from prejudicial publicity and disruptive influences at trial, but carefully avoiding any but the most limited, tangential and indispensable controls on the press." (Emphasis supplied.)

No subsequent opinion of this Court in any way impairs the authority of the portion of the *Sheppard* opinion from which the rule was taken. In these circumstances, Mr. Kunstler's argument that the Rule and Code are "facially unconstitutional" is, to say the least, unpersuasive.

That such restrictions on the conduct of the litigating lawyer would be constitutional was foreshadowed in *In re Sawyer*, 360 U.S. 622 (1959), in which this Court was confronted with a problem similar in many respects to that presented here. While a trial charging conspiracy in violation of the Smith Act was going on, one of trial counsel made a public speech which the Supreme Court of Hawaii and the Ninth Circuit construed as an attack upon the integrity of the federal district judge and his fairness and impartiality in trying the case. The Hawaiian Supreme Court suspended the lawyer from practice for one year. Although five justices of this Court, including Mr. Justice Stewart in a concurring opinion, voted to reverse on the

ground that the attorney was at most "voicing strong criticism of Smith Act cases and the Government's manner of proving them," the four dissenters and Mr. Justice Stewart expressed the view that the attorney could have been disciplined if her remarks had violated the standards of the profession, as Justices Frankfurter, Clark, Harlan and Whittaker (but not Stewart) thought they had.

Mr. Justice Frankfurter's opinion, which on the constitutional question represented the views of a majority of the Court, stated (360 U.S. at 668):

> ". . . Here was a public meeting addressed by counsel for the defense, haranguing a crowd on the unfairness to the defendant of the proceedings in court, *with the high probability indeed almost certainty under modern conditions that the goings-on of the meeting would come to the attention of the presiding judge and the jury.* It took place in a case in which public interest and public tempers had been aroused. When the story of the meeting came to the attention of the judge, he felt obliged publicly to defend his conduct. *It is hard to believe that this Court should hold that a member of the legal profession is constitutionally entitled to remove his case from the court in which he is an officer to the public and press,* and express to them his grievances against the conduct of the trial and the judge. *'Legal trials,' said this Court, 'are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.' Bridges v. California,* 314 U.S. 252, 271.
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> "*Even in the absence of the substantial likelihood that what was said at a public gathering would reach the judge or jury, conduct of the kind found here cannot be deemed to be protected by the Constitution.* An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense. He does not lack for a forum in which to make his charges of unfairness or failure to adhere to principles of law; he

has ample chance to make such claims to the courts in which he litigates. As long as any tribunal bred in the fundamentals of our legal tradition, ultimately this Court, still exercises judicial power those claims will be heard and heeded." (Emphasis supplied.)

Mr. Justice Stewart faced up to the problem whether the litigating lawyer was bound by the ethical standards of the profession. He stated:

"If, as suggested by my Brother Frankfurter, there runs through the principal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from evenhanded discipline for proven unethical conduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.

"*Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.* * * *

"In the present case, if it had been charged or if it had been found that the petitioner attempted to obstruct or prejudice the due administration of justice by interfering with a fair trial, this would be the kind of a case to which the language of the dissenting opinion seems largely directed. * * *" (Emphasis supplied.)

The *Sawyer* case parallels this case in two respects. In the first place, the litigating lawyer there as here sought to try his case "through the use of the meeting-hall, the radio, and the newspaper", with a high probability that what was said "would come to the attention of the presiding judge and jury." Secondly, the *Sawyer* case was concerned with a public challenge to the trial judge's integrity and impartiality.

Compare Kunstler's initial attack on petitioner: ". . . he is doing it for no good reason whatsoever, other than his

own innate prejudice against me. . . . It was done in a cold and crass and criminal manner by a judge who in doing so committed a crime. He violated the civil rights of a defendant . . . he should be indicted . . . he violated his oath of office . . . he violated every tenet of human decency. . . ." Later concerning the related habeas corpus proceeding before Judge Dillin Mr. Kunstler stated "He violated his oath of office. . . . Judge Hoffman pales into insignificance when you compare him to Judge Dillin, because Judge Hoffman was at least honest. Judge Dillin is a fraud . . . he probably has done it because he is trying to avoid the anger of the citizens of Indiana for his integration decree and so he has decided to destroy Arthur Banks in order to get back on the establishment's bandwagon. . . . It's a criminal conspiracy to subvert the Constitution. And these men like Dillin and Holder are criminals and it's too bad that American people don't recognize who the real criminals are in their midst. They are not in Terre Haute prison . . . they sit on benches and destroy human beings." See pp. 9, 10, 11 *supra*.

As to both points Mr. Justice Frankfurter's opinion states that such behavior by trial counsel is not protected by the First Amendment, and Mr. Justice Stewart indicated agreement on the law though not as to the interpretation of the substance of the lawyer's remarks in that case.

Thus the opinions of Justices Stewart and Frankfurter together indicated that the majority of this Court was of the view that the First Amendment did not preclude the temporary disbarment of trial counsel for statements which might affect the fairness of a pending case. Since the instant case concerned only the discretionary authority to grant leave to appear *pro hac vice*, the District Court's action did not go that far.

The Court of Appeals below relies on *Chase* v. *Robson*, 435 F.2d 1059 (9th Cir. 1970). The scope of the prohibitions

involved in the *Chase* case may have warranted application there of the broad First Amendment standard of "clear and present danger" or "serious or imminent threat to the administration of justice". But to read that case more broadly as governing cases like this, would make it inconsistent with the authorities discussed earlier in this brief, the *Sawyer* and *Sheppard* cases in particular, which demonstrate that the test is different for counsel actually participating in a criminal case. These authorities establish that specific prohibitions such as those contained in DR 7-107 and Rule 27 may be generally enforced without further showing of a likelihood that their violation in each individual case will seriously prejudice the administration of justice. Indeed, the suggestion in *Sheppard* (384 U.S. at 363, *supra*, p. 30) that "courts must take steps by rule and regulation" means that a general rule governing the conduct of counsel was both called for and constitutional.

The Court of Appeals in *Chase* referred to "the lesser standard" of reasonable likelihood of a "serious and imminent threat to the administration of justice". The phrase "reasonable likelihood" appears both in *United States* v. *Tijerina*, 412 F.2d 661, 663 n. 1, 666 (10th Cir. 1969), and in the introductory paragraph to the Reardon and Kaufman committee proposals embodied in District Court Rule 27.

In the *Tijerina* case the Tenth Circuit rejected the contention that a clear and present danger test governs the application of an order prohibiting outside publicity in a particular case, saying (412 F.2d at 666):

> "Counsel attack the order on the ground that it is not based on a clear and present danger. The order is based on a 'reasonable likelihood' of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial. We believe that reasonable likelihood suffices. The Supreme Court

has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about the trial."

The Court then pointed out that in *Sheppard* the Supreme Court "established guidelines necessary to assure a fair trial in a case which attracted wide publicity" (p. 667), and concluded:

> "The ultimate question is whether the application to the defendants of an order against extrajudicial statements violates their rights of freedom of speech. The defense argument necessarily places freedom of speech in a preferred position above fair trial. . . . This preferred position has never been approved in a case where a balance must be had between free speech and fair trial. Indeed, the Court has awarded the preference to fair trial. . . .
>
> "The order against extrajudicial statements was designed to maintain the atmosphere essential to the preservation of a fair trial, 'the most fundamental of all freedoms.' . . ."

Just recently on February 5, 1974 the U.S. District Court for the Northern District of Illinois in a joint opinion rendered by five of the senior judges sustained the rules and ethical standards involved in this case against a constitutional challenge. *Chicago Council of Lawyers, et al.* v. *William J. Bauer,* 70C2194 (Opinion attached as Exhibit A). In reaching its conclusion, that court held that the lawyer statements which the rules and standards proscribed were to be assessed in terms of whether the statements presented a "reasonable likelihood" of prejudice to any party or the public's interest in the administration of justice, not the more stringent standard of "clear and present danger", or "serious and imminent threat" which may apply to persons other than lawyers involved in a pending case. The court below, although it previously recognized the lesser standard of "reasonable likelihood" in *Chase,* aban-

doned it in the decision sought to be reviewed. It adopted the test of "serious and imminent threat". Petitioner submits the court in doing so erred.

The text of Rule 27 (which is the rule recommended by the Judicial Conference and the Kaufman committee) demonstrates that the prohibitions upon the public dissemination by trial counsel of statements with respect to the enumerated subjects was not to be watered down by requiring proof of more than the fact that these specific prohibitions had been disregarded.

Rule 27 enumerates the specific restrictions on counsel after arrest or the filing of a complaint, information or indictment. With respect to the six specific subparagraphs, the Kaufman report describes the Reardon committee recommendation (which it adopted) as contemplating (45 F.R.D. at 407):

> ". . . *an absolute prohibition* of extrajudicial disclosure by attorneys of prior criminal records, confessions, tests, witnesses, opinions as to the guilt or innocence of the accused, the merits of the case or the evidence involved, as well as other described matters potentially prejudicial in nature." (Emphasis supplied.)

Thus clearly it was not contemplated that further evidence would be necessary in every case to show that the prohibited disclosures were reasonably likely to interfere with a fair trial or the administration of justice. On the contrary, the whole purport of the recommendations and the Rule was that there would be a reasonable likelihood of such an interference whenever the types of statements specifically prohibitd occurred while the criminal case was pending, and that therefore a general prohibitory rule—"an absolute prohibition"—was justified.

As a practical matter, of course, seldom can it be proved at the time of such extrajudicial comments that they clearly

or seriously or imminently will make it more difficult to impanel an impartial jury or otherwise will prevent a fair trial. But in any community the public dissemination of such statements is reasonably likely to have such an effect. This Court has recognized that a threat to fair trial may be inherent in a certain procedure or conduct although it may be difficult or impossible to prove specific isolatable prejudice. *Cf. Estes* v. *Texas,* 381 U.S. 532, 85 S.Ct. 1628 (1965). In that case the court was concerned with the effect of televising a trial, but its broad concern was that

> "• • • the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs. Our approach has been through rules, contempt proceedings and reversal of convictions obtained under unfair conditions. Here the remedy is clear and certain of application. • • •" (p. 1632)

Some of the concerns of the court in that case are applicable here, viz., the elevation of an ordinary case to a *cause celebre* and the accompanying impact on jurors and witnesses, and additional burdens imposed on the presiding judge. The court concluded that an absolute prohibition of television was necessary to prevent prejudice.

Thus, it is submitted that in the present type situation, a binding rule is necessary to insure that trials will be fair. Furthermore, counsel who wish to abide by the standards of the profession are entitled to definite guidelines. Few lawyers would welcome the problem of having to decide, at the risk of disciplinary proceedings, whether something they say would be "reasonably likely" to interfere with a fair trial or the administration of justice. The inadequacy of such an indefinite standard was one of the reasons why the vague provisions of former Canon 20 were ineffective and seldom enforced. Kaufman report, 45 F.R.D. at 406.

It is submitted therefore that the criteria which govern

the protection of First Amendment freedoms in other circumstances—the need for proof of "a serious or imminent threat" or "a clear and present danger" in a particular case—is not an appropriate guide to determining the propriety of public statements by trial counsel during the pendency of litigation. It must be sufficient, if the objects of the constitutional provisions which seek to guarantee impartial justice are to be achieved, that the rules governing attorneys' conduct prohibit the types of statements which are generally reasonably likely to interfere with the fairness of trial.

The majority of the Supreme Court in *Sawyer* and *Sheppard* obviously did not believe that the *Bridges-Pennekamp-Craig* doctrine was applicable in such circumstances. Accordingly, the invocation of the doctrine of the later cases in the Court of Appeals' decision in *Chase,* while perhaps not inappropriate for the facts presented in that case, should not be extended so as to nullify the specific guidelines to an attorney's conduct embodied in Rule 27 and DR 7-107 of the Code of Professional Responsibility.

B. The Incitations to Demonstrate and Fill the Courtroom.

In the course of the speech and press interview in which he communicated to the public his views as to the credibility of possible witnesses and the merits of his client's case, Mr. Kunstler also urged his listeners to "organize demonstration [sic] in support of Banks," "to fill the courtroom with sympathetic spectators during the trial," "to do everything possible to support the trial" and "anything they can do to call attention to the trial will be welcome. I am not asking them to blow up the courthouse but that would certainly draw attention." "Picket the Courthouse, do anything that will contribute to the issue." His broadcast urged "physical confrontation. . . ." See pp. 7, 9, 10, *supra.* Before the District Court he insisted he had a right under the First Amendment to do this.

The obvious purpose of these remarks was to aid his client by putting pressure on the judge and jury, to influence them through factors entirely extraneous to what would come before them in the ordinary course of an orderly hearing. There is no other way in which Mr. Kunstler could have thought that organizing demonstrations, filling the courtroom, picketing the courthouse or drawing public attention to the trial could have helped him.

Neither the Code of Professional Responsibility nor any Rule of Court in precise words prohibits an attorney from engaging in conduct of this sort—perhaps most lawyers do not have to be told that it would undermine the just functioning of our system of law. DR 1-102(A)(5) and EC 7-36, quoted at p. 4, *supra*, which forbid "conduct prejudicial to the administration of justice," and conduct "that offends the dignity and decorum of proceedings," come the closest. But for counsel to attempt to influence judges and juries by inciting demonstrations or by filling the courtroom more seriously prejudices the fair and lawful administration of justice than mere breaches of dignity or decorum. And this is so even if it be assumed that demonstrators will not be violent, and that the attorney will not deliberately stimulate disorder in the courtroom; a courtroom packed with enthusiasts for one side has an obvious potential for such disorder, as any knowledgeable person would recognize.

The underlying concept of fairness in judicial proceedings is that cases will be decided on the facts in evidence and under the law as understood by the judge, without outside influence. An attempt to bring extraneous factors to bear on judge and jury is thus an effort to subvert the foundation of the judicial process. It may be that judges and juries are not always influenced by all outside considerations. But this does not excuse a litigating lawyer who deliberately incites others to exert or to attempt to exert

outside influence as a tactical device. *Cf. Estes* v. *Texas*, *supra*, p. 35. Such conduct clearly goes beyond permissible means of zealously representing a client.

This would be patently obvious if many lawyers in many cases sought to arouse the public to demonstrate or pack courtrooms in support of their clients. Unless the practice was halted, the fair administration of justice would become impossible. And such tactics do not become more tolerable because exercised in behalf of members of minority groups, or only in cases which lawyers are convinced of their clients' rectitude and fear that the unpopularity of their cases may make it difficult for them to win. These are precisely the situations in which an unpressured tribunal is the most vital. For pressure and influence may be exerted more powerfully by majorities than minorities.

Since the incitations in question would be "prejudicial to the administration of justice" in contravention of DR 1-102(A)(5), the attorney's action is not protected by the First Amendment. The basic reason is the same as for violations of the Code provisions governing pretrial publicity, discussed at pp. 23-36, *supra*—fair trials and due process of law are dependent upon fair and unbiased judges and juries.

The question here is not whether persons generally have a right to attend proceedings in courtrooms, or to demonstrate or organize demonstrations relating to a pending case. Whether they do not may or will depend on the circumstances, and Mr. Kunstler's remarks are not specific as to time or place or content or noisiness or orderliness, except for his specific plea for filling the courtroom with sympathizers. The issue here is whether the Constitution guarantees the litigating attorney the right to try to influence a court in this manner. Mr. Justice Stewart's admonition in *Sawyer* (*supra*, p. 30) that an attorney may be

bound by ethical precepts to abstain from what "might be constitutionally protected speech for others" is equally applicable to such statements as well as to those discussed in Point II A. And so is the teaching of *Sheppard* v. *Maxwell*, that one means of reconciling the fair trial-free press dilemma is to leave the press and other persons free but to adopt rules restricting what the counsel for the parties may communicate to the public while a case is pending. In *Cox* v. *Louisiana* (No. 2), 379 U.S. 559 (1965), this Court upheld a statute making it a crime to picket or parade near a courthouse "with the intent of interfering with . . . the administration of justice or . . . of influencing any judge, juror, witness or court officer." The unspoken premise of the opinion was that the same sort of picketing might have been lawful in other circumstances. The majority opinion of Mr. Justice Goldberg, with no dissent on this point, said (379 U.S. at 562):

> "There can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create. Since we are committed to a government of laws and not of men, it is of the utmost importance that the administration of justice be absolutely fair and orderly. This Court has recognized that the unhindered and untrammeled functioning of our courts is part of the very foundation of our constitutional democracy. See *Wood* v. *Georgia*, 370 U.S. 375, 383. The constitutional safeguards relating to the integrity of the criminal process attend every stage of a criminal proceeding, starting with arrest and culminating with a trial 'in a courtroom presided over by a judge.' *Rideau* v. *Louisiana*, 373 U.S. 723, 727. There can be no doubt that they embrace the fundamental conception of a fair trial, and that they exclude influence or domination by either a hostile or friendly mob. There is no room at any stage of judicial proceedings for such intervention; mob law is the very antithesis of due process. See *Frank* v. *Mangum*, 237 U.S. 309, 347 (Holmes, J., dissenting). A State may

adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence."

The *Cox* case differs from this one in that the Court there relied on the specificity of the criminal statute and because picketing and parading were regarded as conduct and not merely speech. But the same passage (p. 463) reviews the cases holding that verbal incitations to wrongful conduct do not have First Amendment protection. Verbaly incitation to exert pressure on a judicial tribunal would seem to fall in the same category. Furthermore, Mr. Kunstler is not being subjected to criminal penalties, but only prevented from trying a case in a court to which he has not been admitted to practice. And Mr. Banks is not precluded from obtaining competent counsel, from Indiana or elsewhere.

CONCLUSION

The Court of Appeals attempts to suggest that petitioner was concerned solely with the right of respondent to a fair trial. Petitioner was indeed concerned with the right of respondent, but petitioner was also concerned with the rights of the prosecution and the public. Petitioner submits that such broad concern is evident in his opinion where he referred to the rights of both "Mr. Banks" and "the public . . . to a fair trial and impartial trial" and also the "obligation [of the Court] . . . to provide a fair and impartial trial to all parties."

However, the Court of Appeals does address the broader question which requires a balancing of the rights of all parties and the public. The Court held "before a trial court may properly limit the defendant's right to a chosen counsel, there must be sufficiently supported and specific findings of fact that the conduct of the defendant's attorney creates a serious and imminent threat of 'significant

prejudice to the defendant himself' or of 'disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' "

The Court of Appeals relies only on two cases to resolve the free speech-fair trial-right to counsel issues. *Magee* v. *Superior Court of City & County of San Francisco*, 506 P.2d 1023 (1973); *Chase* v. *Robson*, 435 F.2d 1059 (7th Cir. 1970). Petitioner submits that the Court's combination of the holdings of those two cases is clearly erroneous. The conclusion based on *Chase* that an attorney's conduct must be specifically found to have a "serious and imminent threat" to a fair trial is a misplaced reliance on the law governing free speech of persons other than lawyers in a pending case. This Court in *Sawyer* and *Sheppard* clearly indicated that the conduct of lawyers participating in a pending case is subject to a different standard. Furthermore, the Court of Appeals abandoned the lesser standard it had previously recognized in *Chase*, that certain conduct may be assessed in terms of having a "reasonable likelihood" of threatening a fair trial and the administration of justice. That was the standard established in the 10th Circuit in *Tijerino*. With respect to the Court's reliance on *Magee*, it is true that the court in that case did recognize that conduct of a lawyer is an appropriate consideration in determining his admission *pro hac vice*, but the Court was not in fact concerned with any conduct of counsel and did not state that lawyer conduct when in issue must be measured in terms of whether it poses a serious and imminent threat to a fair trial.

In summary it is submitted that the court below decided a question in conflict with this Court's decisions in *Sawyer* and *Sheppard*, that the decision below is in conflict with the appellate court of another circuit, viz., *Tijerino*, and to the extent this Court has not by its prior opinions specifically sanctioned the rules regarding conduct of counsel

in pending criminal cases there are presented important questions of federal law, which have not been, but should be settled by this Court.

The relief petitioner seeks is a reversal of the decision of the Court of Appeals, a declaration that the rules of court and ethical standards involved are constitutional, and a finding that petitioner was acting within his discretion in denying Mr. Kunstler leave to appear *pro hac vice* on the grounds of the delays attributable to Mr. Kunstler and his violation of court rules and ethical standards relating to pretrial publicity.

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EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO COUNCIL OF LAWYERS, ET AL.,
Plaintiffs,
v.
WILLIAM J. BAUER, ET AL.,
Defendants,
TERENCE MACCARTHY, ET AL.,
Intervenors.
No. 70 C 2194

MEMORANDUM AND ORDER ON DEFENDANTS' AND INTERVENORS' MOTIONS

The Chicago Council of Lawyers, an association of local lawyers, and seven of its attorney members have filed this action for declaratory judgment and injunction seeking a finding that Rule 1.07 of the Local Criminal Rules of this court and Disciplinary Rule DR 7-107 of the American Bar Association Code of Professional Responsibility (collectively referred to as the no-comment rules) are facially unconstitutional as violative of the plaintiffs' first amendment rights.[1] The no-comment rules prohibit the release of information by counsel in connection with pending criminal jury cases, "if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice." Local Rule 1.07 (a). A.B.A. Disciplinary Rule DR 7-107(G) extends these principles to civil cases.[2]

[1] The plaintiffs allege that Local Rule 8 and the November, 1965 Policy Statement issued by the judges of this court are intended to incorporate the A.B.A. Disciplinary Rules. For purposes of this memorandum, the court will assume *arguendo* that this interpretation is correct.

[2] The "reasonable likelihood" standard, adopted in Section (a) of Local Rule 1.07, clearly applies to all succeeding paragraphs. Section (a) was

The complaint has two counts: Count I is on behalf of plaintiff's individually while Count II is a purported class action brought on behalf of all similarly situated attorneys. Certain criminal defense lawyers were granted leave to intervene and presently have before the court a motion to have themselves declared the proper representatives of the subclass of attorneys defending criminal cases. Both the intervenors and the defendants have moved to dismiss for failure to state a claim upon which relief can be granted.[3] For the reasons herein stated, the court grants the motions of intervenors and defendants to dismiss. In light of this disposition, the procedural questions raised by the intervenors need not be reached.

A fundamental tenet of our system of justice is "that conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence. . . ." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). The right to a fair and impartial adjudication extends not only to criminal defendants but also to the government and, through it, to society. *Cf. Williams v. Florida*, 399 U.S. 78, 82 (1970); *North Carolina v. Pearce*, 395 U.S. 711, 721 n. 18 (1969); *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir.), *cert. den.*, 396 U.S. 990 (1969); *State v. Kavanaugh*, 52 N.J. 7, 243 A.2d 225, 231 (1968). Yet, in recent years, it has become increasingly evident that this fundamental right has been seriously threatened by excessive and prejudicial publicity.

Against this background, the Supreme Court in *Sheppard v. Maxwell*, 384 U.S. 333 (1961), directed district courts to seek an accommodation between the competing constitutional guarantees of fair trial and free speech. In clear and unequivocal language, the Court declared:

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expressly intended to state the broad principle underlying the specific restrictions contained in Sections (b) through (e). Likewise, the standard was clearly the underlying theory upon which the A.B.A. Disciplinary Rules were promulgated. Advisory Committee on Fair Trial and Free Press, ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Fair Trial and Free Press*, 84-85, Tentative Draft (1966).

[3] The American Bar Association, as amicus curiae, has submitted a brief in support of the motions to dismiss.

"The courts *must* take such steps by *rule and regulation* that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only *subject to regulation, but is highly censurable and worthy of disciplinary measures.*" (Emphasis added.) 384 U.S. 363.

With respect to extrajudicial disclosures by counsel, the Court was quite explicit:

"More specifically, *the trial court might well have proscribed extrajudicial statements by any lawyer,* party, witness, or court official *which divulged prejudicial matters,* such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case." (Emphasis added.) 384 U.S. 361.

The efforts of the courts and the bar to implement these mandated directives culminated in the adoption of the currently challenged rules.[4]

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[4] The *Sheppard* decision generated a series of major studies designed to develop a practical solution to the fair trial-free speech dilemma. Among the most significant were: (1) Advisory Committee on Fair Trial and Free Press, ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Fair Trial and Free Press*—Tentative Draft (1966), Approved Draft (1968) [hereinafter cited as the Reardon Report]; (2) Committee on the Operation of the Jury System, Judicial Conference of the United States, *Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue* (Sept., 1968), reported in 45 F.R.D. 391 [hereinafter cited as the Kaufman Report]; (3) Association of the Bar of the City of New York, Special Committee on Radio, Television, and the Administration of Justice, *Freedom of the Press and Fair Trial, Final Report with Recommendations* (1967) [hereinafter cited as the Medina Report].

II. CRIMINAL JURY TRIALS

The plaintiffs contend that there are four respects in which the no-comment rules, as applied to criminal jury trials, exceed the minimum restraint required to assure a fair and impartial jury trial and are thus facially unconstitutional.

Plaintiffs first argue that the failure of the rules to provide for the employment of traditional protective devices, in lieu of partially silencing attorneys, renders them unconstitutional.[5] Initially, it must be remembered that such devices, unlike the challenged rules, are not preventive measures, but merely attempts to overcome the effects of prejudicial publicity once it has occurred. As the court in *Sheppard* was careful to point out, "the cure lies in those remedial measures that will *prevent* the prejudice at its inception." (Emphasis added.) 384 U.S. 333, 363.

Measured against the no-comment rules, these traditional techniques are clearly inadequate. Continuances, of course, are in conflict with the Sixth Amendment guarantee of a speedy trial. Changes of venue compel defendants to sacrifice their constitutional right to trial in the locale in which the crime took place. Further, neither these devices nor cautionary instructions can negate the effect of prejudicial publicity once it has permeated the proceedings. Sequestration of the jury is equally inadequate. If it is ordered

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This court has found the recommndations of the Kaufman Report to be particularly persuasive. The report was prepared by a committee of 12 federal court judges, chaired by Judge Edward T. Gignoux of Maine, and was ultimately adopted by the Judicial Conference of the United States. In it, the committee specifically recommended the implementation of local court rules designed to control the release of prejudicial information by attorneys on penalty of disciplinary action. 45 F.R.D. 401. In substantial portion, Local Rule 1.07 was drawn verbatim from the suggested rules prepared by the committee. It is especially significant that, after circulating the report to all federal judges, the committee reported, "[t]he individual and collective opinions of federal judges . . . overwhelming reflected general satisfaction with all recommendations of the report." 45 F.R.D. 400.

[5] Traditional protective devices include continuances, changes of venue, cautionary instructions and sequestration.

because of the jurors' exposure to prejudicial publicity before trial, irremediable damage may have already been done. Sequestration is generally viewed as an undesirable last resort by defense counsel (Intervenor's Br. 24) and may itself prejudice the defendant because of the inconvenience and annoyance it causes jurors. It should not be invoked merely to permit attorneys to disseminate prejudicial publicity. *See Reardon Report,* 73-76.

Plaintiffs next contend that the rules are unconstitutionally overbroad because they fail to draw any distinction between comments favorable to the criminal defendant and those which are hostile. Admittedly, the publicity problem in the main has been one of prosecutorial excesses. *Reardon Report,* 37, 42-45. However, this does not permit the court to assume that defense counsel's comments would be non-prejudicial to the prosecution even though merely favorable to the defendant. Indeed, the report of a New York City Bar Association committee, chaired by Judge Harold R. Medina, indicated that it is not uncommon for defense counsel to actively generate publicity which may taint the impartiality of a tribunal. *See Medina Report,* 43-55; *Reardon Report,* 42-43, 175: *United States ex rel. Bloeth v. Denno,* 313 F.2d 364, 378-79 (2nd Cir.) (dissent), *cert. den.,* 372 U.S. 978 (1963); *Sheppard v. Maxwell, supra,* 361. The adoption of the onesided approach urged by the plaintiffs would ignore the correlative interest of society in a fair trial. Any limitation of prejudicial comment should apply to any attorney bent on securing improper advantage. *State v. Van Duyne,* 43 N.J. 368, 204 A.2d 841, *cert. den.,* 380 U.S. 987 (1969); *State v. Kavanaugh, supra.*

Plaintiffs' third objection is that the rules constitute a "prior restraint" of first amendment rights and must be judged accordingly. *See Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971); *New York Times Co. v. United States,* 403 U.S. 713 (1971). However, unlike the cited cases, the instant situation does not impose a blanket prohibition on all speech irrespective of content. Rather, the challenged rules seek only to punish speech from which prejudice is reasonably likely to result. They impose a responsibility on those who violate them as do the laws on

slander, libel and obscenity. The rules are therefore clearly not a prior restraint.

Finally, plaintiffs attack the rules on the ground that they are not predicated upon a "clear and present danger" of prejudicial effect, but rather employ the lesser standard of "reasonable likelihood." In support of this proposition, they cite *Bridges v. California*, 314 U.S. 252 (1941), *Pennekamp v. Florida*, 328 U.S. 331 (1946), *Craig v. Harney*, 331 U.S. 367 (1947), and *Wood v. Georgia*, 370 U.S. 375 (1962). It is the opinion of this court that neither the Constitution nor the cited case law supports plaintiffs' conclusion.

Bridges and its progeny are more accurately cited for the proposition that, where no "judicial proceeding [is] pending," the First Amendment rights of the press and private citizens cannot be proscribed by court order without a serious and imminent threat to the administration of justice. *Bridges v. California, supra* at 263. This court, however, cannot accept the notion that these principles must be extended to lawyers participating in on-going litigation.

Additionally, this court takes cognizance of significant factual differences which distinguish the *Bridges-Wood* line of decisions from the situation now before the court. Each of the cases cited by the plaintiffs was concerned with defining the permissible scope of the contempt power, "a common law concept of the most general and undefined nature." *Bridges v. California, supra* at 260. None dealt with the violation of a narrowly drawn statute or court rule which seeks to accommodate competing constitutional interests.

The Supreme Court has made it abundantly clear that review of convictions will differ drastically from review of statutory violations, where the need for regulation has been buttressed by prior legislative deliberations. *Bridges v. California, supra* at 260-61; *Wood v. Georgia, supra* at 386. In the later situation, great deference is accorded to the judgment of the legislature. *See, e.g., Dennis v. United States*, 341 U.S. 494 (1951); *Barenblatt v. United States*,

360 U.S. 109 (1959). In view of the extensive deliberations which preceded the promulgation of the challenged rules, see footnote 4, *supra*, it is evident that they must be judged by standards analogous to those applied to legislative action. Thus, having reached the court "encased in the armour wrought by prior legislative deliberation," *Bridges v. California, supra* at 261, these rules should not be overturned lightly.

Perhaps the most effective distinction may be drawn from the language of *Wood* itself. There, as in *Bridges, Pennekamp,* and *Craig,* the Court was dealing with hostile remarks directed at judges or the general administration of justice. This must be distinguished from the situation where the communication might prejudice a pending trial. The court noted at p. 389-90:

> "[I]t is important to emphasize that this case does not represent a situation where an individual is on trial; there was no 'judicial proceeding pending' in the sense that prejudice might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial or a grand jury proceeding. . . . Moreover, we need not pause here to consider the variant factors that would be present in a case involving a petit jury. *Neither Bridges, Pennekamp nor Harney involved a trial by jury.* In Bridges, it was noted that 'trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper' (314 U.S., at 271), *and of course the limitations on free speech assume a different proportion when expression is directed toward a trial as compared to a grand jury investigation.*" (Emphasis added.)

In *In Re Sawyer,* 360 U.S. 622 (1959), the Supreme Court was confronted with a problem similar to the one present here. During the pendency of a criminal case, one of the trial counsel made a public speech construed by the Supreme Court of Hawaii as an attack on the fairness and impartiality of the federal district court judge presiding over the trial. As a result, the Hawaii Supreme Court found Mrs. Sawyer guilty of gross misconduct and sus-

pended her from practice for one year. In a five to four decision, the United States Supreme Court reversed Mrs. Sawyer's suspension, on the ground that the findings upon which the suspension rested were not supported by the evidence. The dissent emphasized the proposition that the First Amendment rights to active trial counsel were significantly less immune from restriction than those of other private citizens or the media.

In the course of his opinion for the dissenters, Justice Frankfurter stated at 668:

> "Here was a public meeting addressed by counsel for the defense, haranguing a crowd on the unfairness to the defendant of the proceedings in court, with the high probability indeed almost certainty under modern conditions that the goings-on of the meeting would come to the attention of the presiding judge and the jury. It took place in a case in which public interest and public tempers had been aroused. When the story of the meeting came to the attention of the judge, he felt obliged publicly to defend his conduct. *It is hard to believe that this Court should not hold that a member of the legal profession is constitutionally entitled to remove his case from the court in which he is an officer to the public and press, and express to them his grievances against the conduct of the trial and the judge.* 'Legal trials,' said this Court, 'are not like elections, to be won through the use of the meeting-hall, the radio and the newspaper.' [citing *Bridges, supra,* 271]
>
> "*Even in the absence of the substantial likelihood that what was said at a public gathering would reach the judge or jury, conduct of the kind found here cannot be deemed to be protected by the Constitution.* An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an "officer of the court" in the most compelling sense. He does not lack for a forum in which to make his charges of unfairness or failure to adhere to principles of law; he has ample chance to make such claims to the courts in which he litigates. As long as any tribunal

bred in the fundamentals of our legal tradition, ultimately this Court, still exercises judicial power those claims will be heard and heeded." (Emphasis added.)

Justice Stewart concurred in the reversal but solely on the basis that the evidence was insufficient. His carefully limited concurrence demonstrates that he agreed with the constitutional principles articulated by Justice Frankfurter:

> "If, as suggested by my Brother Frankfurter, there runs through the principal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from evenhanded discipline for proven unethical conduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> "*Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.* (Emphasis added.) 360 U.S. 646.

When considered together, the views expressed in the dissent and Justice Stewart's concurring opinion at least stand for the proposition that the First Amendment does not immunize trial counsel from discipline for public statements which might affect the fairness of a pending case, see *Sheppard v. Maxwell, supra* at 363, and raises substantial doubt as to the viability of the "clear and present danger" test as a measure of protected speech in that context. Neither the "clear and present danger" test nor the rulings in *Bridges, Pennekamp,* or *Craig* were intimated as controlling.[6]

Some of these very issues were recently considered in *United States v. Tijerina, supra.* There, the court reviewed

[6] Of particular note is Justice Frankfurter's statement that even in the absence of a "substantial likelihood" of court exposure to the declarations, Mrs. Sawyer's conduct remained constitutionally unprotected. *See* Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenberg—and Beyond,* 1969 S. Ct. Rev. 41.

a criminal contempt conviction arising from public statements made by defendants in violation of a pre-trial order prohibiting comments by all attorneys and defendants. The defendants asserted that the order was invalid since it was not based upon a clear and present danger to the administration of justice. The Tenth Circuit rejected defendants' argument, stating at p. 666:

> "We believe that reasonable likelihood suffices. The Supreme Court has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about the trial."

Accord, In Re Sawyer, 260 F.2d 189 (9th Cir. 1958), *rev'd on other grounds,* 360 U.S. 622 (1959); *State v. Van Duyne, supra; Hamilton v. Municipal Court,* 76 Cal. Rptr. 168 (1st Dist.), *cert. den.,* 396 U.S. 985 (1969); *Kaufman Report,* 404-7; *Reardon Report,* 93.

Accordingly, it is the judgment of this court that a "clear and present danger" to the fair administration of justice is not the required standard to be used in measuring the constitutionality of court rules proscribing the dissemination of prejudicial remarks by active trial counsel.

In the final analysis, the right of trial counsel to comment on pending criminal proceedings must be weighed against the right of individual defendants and society to a fair and impartial trial. As the Supreme Court has repeatedly indicated, "the societal value of speech must, on occasion, be subordinated to other values and considerations." *Dennis v. United States, supra,* 503. In such cases, the court must weigh the individual and societal interest in freedom of expression against the societal interest in the result which the regulation may achieve. *See, e.g., Breard v. Alexandria,* 341 U.S. 622 (1951); *Dennis v. United States, supra; Rowan v. Post Office,* 397 U.S. 728 (1970).

Upon examination of the interests asserted by plaintiffs, this court finds them to be neither compelling nor evident. Initially, it is important to observe that the challenged rules do not establish a blanket prohibition on all speech.

Attorneys may quote from or refer to the public record, request assistance in obtaining evidence, release the facts surrounding the time and place of the arrest, as well as announce that the accused denies the charges against him. A.B.A. Disciplinary Rule DR 7-107(B). Furthermore, it is apparent from even the briefest survey of the situation that the public's right to know is not substantially impaired. *See Red Lion Broadcasting Co. v. F.C.C.* 395 U.S. 367 (1969). The media, as well as private citizens, remain unrestrained in their ability to comment on pending proceedings. Only the voices of participating attorneys are stilled, and then only if the statements present a reasonable likelihood of prejudicing the judicial process.

Nor can it be contended that participating attorneys have a proper interest in publicly discussing matters not of record that could affect the outcome of the litigation. Any such statements invite the fact finder to weigh these considerations in addition to or in disregard of the evidence presented at trial. A courtroom "is a place for trial of defined issues in accordance with law and rules of evidence, with standards of demeanor for court, jurors, parties, witnesses and counsel." *In Re Dellinger,* 461 F.2d 389, 401 (7th Cir. 1972). The injection of prejudicial remarks would remove justice from its proper forum, to the advantage of those skilled in manipulating the media and the public.

Moreover, in the process of accommodating the fair trial guarantee with other constitutional rights, the Supreme Court has indicated that the former must prevail:

> "We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs. Our approach has been through rules, contempt proceedings and reversal of convictions obtained under unfair conditions. Here the remedy is clear and certain of application and it is our duty to continue to enforce the principles that from time immemorial have proven efficacious and necessary to a fair trial." *Estes v. Texas,* 381 U.S. 532, 540-41 (1965). *See United States v. Tijerina, supra.*

Finally, in light of *Sheppard v. Maxwell, supra*, the "reasonable likelihood" standard is mandatory. There, the Supreme Court established the principle that criminal defendant need only show a probability of prejudicial circumstances to obtain reversal of his conviction. If convictions are to be overturned on a showing that publicity *probably affected* the outcome, attempts by court rule to forestall such prejudice must be judged by the same standard. To adopt a more lenient guideline would allow unprincipled attorneys to frustrate the judicial process with impunity and thus ignore the command of the Supreme Court in *Sheppard*, to deal with the problem by "rule and regulation."[1] *See United States v. Tijerina, supra; State v. Van Duyne, supra; Hamilton v. Municipal Court, supra.*

II. CIVIL JURY TRIALS

Plaintiffs argue that A.B.A. Disciplinary Rule DR 7-107 (G) is unconstitutionally overbroad because it extends the restraints of the no-comment rules to civil jury cases. Plaintiffs base their contention upon the following reasoning: major social and political issues are likely to find their way into the federal courts; intelligent discourse on these issues is vital to society's interests; attorneys involved in such litigation can make significant contributions to these discussions; thus participating counsel should be unfettered in their discussion of pending civil cases.

Yet, the need for rational resolution of disputes in accordance with the law and rules of evidence is no less compelling in civil litigtaion than in criminal trials. "The very purpose of a court system is to adjudicate controversies, *both criminal and civil*, in the calmness and solemnity of the courtroom according to legal procedures." (Emphasis added.) *Cox v. Louisiana*, 379 U.S. 559, 583-84 (1965)

[1] Plaintiffs' reliance on *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970) and *In Re Oliver*, 452 F.2d 111 (7th Cir. 1971) is misplaced. In *Chase*, the Seventh Circuit specifically declined to rule on the issue. Similarly, in *Oliver*, the court's decision was premised upon the unconstitutionality of this District's policy statement of November, 1965. No opinion was expressed as to the propriety of the "reasonable likelihood" standard.

(Black J., dissening). Many of the reasons which established the constitutionality of the no-comment rules as applied to criminal jury trials also support the conclusion that A.B.A. Disciplinary Rule DR 7-107(G) is not overbroad. See Section I, *supra*.[8]

III. CIVIL AND CRIMINAL BENCH TRIALS

Finally, plaintiffs argue that the no-comment rules are overbroad because they fail to distinguish between jury and bench trials. Although the need for these restrictions may be more acute in the jury context, and although the challenged rules emanated from abuses arising therein, this does not mean that the possibility for prejudice is nonexistent at bench trials. Speaking in an analogous context, the Supreme Court has recognized:

> "that most judges will be influenced only by what they see and hear in court. However, judges are human; and the legislature has the right to recognize the danger that some judges . . . and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of trial." *Cox v. Louisiana, supra* at 565.[9]

---

[8] No weight should be attributed to the failure of the various study committees, *see* note 4 *supra*, to make recommendations concerning civil cases, as such matters were beyond the scope of the committee undertakings.

[9] Justice Frankfurter had earlier noted that out-of-court comment might affect judicial perceptions:

> "A powerful newspaper admonished a judge, who within a year would have to secure popular approval if he desired continuance in office, that failure to comply with its demands would be 'a serious mistake.' . . . If such a sentence had been imposed, readers might assume that the court had been influenced in its action; if lesser punishment had been imposed, at least a portion of the community might be stirred to resentment. It cannot be denied that even a judge may be affected by such a quandary." *Bridges v. California, supra* at 299-300.

While the tenure of federal judges protects them from electoral ramifications of their decisions, the manner in which a judge views a case may be affectd by statements sought to be proscribed.

IV. ORDERS OF THE COURT

It is therefore ordered that:

1. In view of the following disposition, the Intervenors' motion to have themselves declared the proper representatives of attorneys who regularly represent defendants in criminal cases in this district shall be, and the same is hereby, denied.

2. The Defendants' and Intervenor's motions to dismiss shall be, and the same are hereby, granted.

s/ Edwin A. Robson
s/ Richard B. Austin
s/ James B. Parsons
s/ Hubert L. Will
s/ Bernard M. Decker
Executive Committee

Date: February 5, 1974

APR 5 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-841

THE HONORABLE CALE J. HOLDER,
United States District Judge,
Petitioner,

—v.—

ARTHUR BANKS,
Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE INDIANA CIVIL LIBERTIES UNION, *AMICI CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-841

THE HONORABLE CALE J. HOLDER,
United States District Judge,

Petitioner,

—v.—

ARTHUR BANKS,

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 42 of the Rules of the United States Supreme Court, the American Civil Liberties Union and the Indiana Civil Liberties Union respectfully move for leave to file a brief amici curiae in the above entitled case. Counsel for the respondent has consented to the filing of this brief; counsel for the petitioner has orally denied such consent.*

The American Civil Liberties Union is a nation-wide, non-partisan organization of over 250,000 members dedicated solely to the protection of those liberties safeguarded by the Bill of Rights. The Indiana Civil Liberties Union is an affiliate of the ACLU, functioning within the State of Indiana, where this case arose.

* The respondent's letter of consent has been filed with the Clerk of the Court.

The issues in this case are of great interest to the ACLU for two reasons. First, the actions of the petitioner in this case seriously burden the criminal defendant's rights, under the First, Fifth and Sixth Amendments, to counsel of his choice. They equally burden the right of free expression available to members of the bar no less than to citizens generally. If the action of the District Court is ultimately upheld, these various constitutional safeguards are jeopardized.

Our second interest relates to the ACLU itself. At any given time, the ACLU and its forty-eight affiliates throughout the nation, provide counsel in approximately 5,000 cases involving civil liberties issues. Counsel is provided without fee by staff attorneys and frequently by hundreds of volunteer attorneys. Often our attorneys handle cases in jurisdictions in which they are not admitted to practice. They appear in conjunction with local counsel, but their admission must be secured on a *pro hacc vice* basis, in the discretion of the court, state or federal. If that discretion can be exercised in the manner attempted below, then in many situations our attorneys will have to circumscribe their First Amendment rights as a condition to handling our cases, and our clients will have to settle for being represented by attorneys willing to be so circumscribed.

For these reasons, we seek to participate in the Court's resolution of the issues in this case.

Respectfully submitted,

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March 31, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-841

THE HONORABLE CALE J. HOLDER,
United States District Judge,

Petitioner,

—v.—

ARTHUR BANKS,

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE INDIANA CIVIL LIBERTIES UNION, *AMICI CURIAE*

The interest of *amici* is set out in the preceding motion for leave to file brief *amici curiae*.

Statement of the Case

The basic fact situation, which is outlined in detail in respondent's brief, is as follows:

Respondent was an inmate in the federal penitentiary at Terre Haute, Indiana when he was indicted on December 14, 1972 for assaulting a guard. He sought to retain Mr. William Kunstler of New York as his lawyer. Another local attorney, Mr. Brent Barnhart, represented him at

arraignment and filed certain pre-trial motions on his behalf. On March 21, 1973 Mr. Kunstler filed a motion for leave to appear as Banks' counsel. That motion as well as the discovery motions filed earlier were set for a hearing on April 1, 1973 before petitioner.

At the April 1, 1973 hearing, petitioner questioned Mr. Kunstler about certain public statements he had allegedly made about the case. The statement of the case outlined in petitioner's brief seeks to create the impression that Mr. Kunstler regularly travelled to Terre Haute and Indianapolis to issue numerous public statements about the case. In fact, the public statements or comments offered in evidence consisted only of the following:

1. On February 9, 1973, Mr. Kunstler appeared before a high school student audience in Terre Haute and spoke about the draft and war-resistance and about prisons, and about the need for sympathizers of Mr. Banks to come to his trial. He later went to a cocktail party reception at a law office in Indianapolis and was sought out and interviewed by a reporter from the *Indianapolis Star*. A news story about that interview was published in the *Star* on February 10, 1973 at p. 31.

2. The government offered in evidence a press release issued by a committee that was supporting Mr. Banks which contained various remarks by Mr. Kunstler about Mr. Banks. There was no proof as to whether the quotes were accurate, whether their release was authorized, whether any publicity resulted or whether anyone in Terre Haute in fact read them.

3. The court made available to the government a transcript of a news broadcast from a local radio station containing public statements by Mr. Kunstler. They apparently made no reference to the Banks case other than to urge people who supported Mr. Banks to come to his trial.

4. Time Magazine of February 26, 1973 contained a story about the Banks case in which Mr. Kunstler is quoted as saying: "The moment he went into prison he was doomed."

Based on this material, the petitioner questioned Mr. Kunstler and Mr. Banks about the prejudicial effect of the remarks on the pending trial. Petitioner's remarks, quoted at length in respondent's brief, shows that he disapproved of Mr. Kunstler's views on the draft, amnesty and other public issues and thought Mr. Banks would be injured by having a controversial lawyer like Mr. Kunstler represent him. It might be, according to petitioner, like "carrying a monkey on your back." Petitioner also sought to introduce some material that indicated that the Angela Davis defense fund was supporting the case—which was totally contrary to fact. Thereafter, the petitioner denied Mr. Kunstler's motion to appear as counsel in this action.

All of the other statements quoted by petitioner in his brief (at pp. 9-12) occurred after the April 1, 1973 hearing and have no relevance to this appeal. They show Mr. Kunstler's justifiable anger at being dismissed from the case and their quotation by petitioner on this appeal is totally improper.

Subsequent to this Court's grant of the petition for certiorari, Mr. Banks was released on bail due to a habeas corpus petition filed on his behalf by Mr. Kunstler.

Summary of Argument

The Sixth Amendment guarantees a defendant a fair opportunity to secure counsel of his own choice. In the context of this action, the guarantee means that a defendant must be afforded the right to secure out-of-state counsel of his choice. Many courts have struck down restrictive rules and regulations that undermine the right of a defendant or litigant to engage out-of-state counsel.

The problem is particularly acute when the defendant's claim or defense is unpopular and assistance by an out-of-state counsel may be the only means available for vindication. In the civil rights movement in the early 1960's, the availability of out-of-state counsel was necessary to protect the First and Fourteenth Amendment rights of citizens in the South. In this case also, the claim and defense of the defendant is unpopular and the assistance of skilled and sympathetic counsel from outside the jurisdiction is necessary to protect his rights. Out-of-state counsel also aids in the administration of justice since his participation may lead to more efficient presentation of the case and reduces the likelihood of disorder in the court.

There is no state interest which justifies the denial of defendant's selection of out-of-state counsel. There was no showing of any trial delay nor could counsel be accused of any serious misconduct. The violation of pre-trial publicity rules cannot justify the denial of counsel. In the first place there was no violation of the rules. Secondly, the rules cannot be interpreted to cover the brief comments of counsel involved in the instant case. Finally, the rules do not

provide for the sanction of denying a defendant out-of-state counsel of his choice.

To the extent that the fair trial-free press rules forbid comments by an attorney on his client's innocence, they violate the First Amendment and cannot be enforced. There must be an imminent and direct danger to the administration of justice before comments by an attorney can be punished in any way. That clearly is not the situation in the present case.

ARGUMENT

This case presents a vital problem in the administration of justice in this nation: can a trial judge deny a defendant out-of-state counsel of his choice only because the attorney has made public statements about the case which the trial judge disapproves of? Petitioner's actions under review threaten to undermine the accepted practice of attorneys travelling from one jurisdiction to another because their talents, expertise or sympathies are enlisted by defendants who are not satisfied with local counsel. If petitioner's order is upheld, it could mean that expert counsel for minority groups, specialists in different phases of federal law, outstanding criminal lawyers, or constitutional law experts could be barred from practicing in jurisdictions where their talents are most needed merely because they may have made public statements about the case in issue.

If this Court reverses the Court of Appeals decision below, it would not only violate the First Amendment rights of the attorney and the Sixth Amendment rights of the respondent, it would also threaten the long-standing tradition

of every American attorney being available to anyone in the nation who might need his or her services, a practice exemplified by such legendary practitioners as Clarence Darrow or John W. Davis—a tradition as old as Andrew Hamilton's defense of John Peter Zenger in colonial times.

I.

The petitioner's denial of counsel of his choice to respondent is an abridgement of respondent's Sixth Amendment right to counsel, his Fifth Amendment right to due process, and his First Amendment right of expression and association.

A. *A Defendant's Right to Out-of-State Counsel of His Choice Is Required by the Sixth Amendment.*

The application of the Sixth Amendment right to counsel to the circumstances of this case demands that respondent be allowed the right to counsel of his own choosing.* As this Court said in *Powell* v. *Alabama*, 287 U.S. 45, 53 (1932) " . . . a defendant should be afforded a fair opportunity to secure counsel of his own choice." See also *Glasser* v. *United States*, 315 U.S. 60, 70 (1942); *In re Groban*, 352 U.S. 330, 332 (1957).

As in the case at bar, courts have held that the substitution of court-appointed counsel over counsel of defendant's choice is a violation of constitutional rights. See *Reickauer*

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* Access to legal advice is also protected by the First Amendment. See *Brotherhood of R.R. Trainmen* v. *Virginia State Bar*, 377 U.S. 1 (1964); *NAACP* v. *Button*, 371 U.S. 415 (1963).

v. *Cunningham,* 299 F.2d 170 (4th Cir., 1962); *Lefton* v. *City of Hattiesburg, Mississippi,* 333 F.2d 280 (5th Cir., 1964). In *Releford* v. *United States,* 288 F.2d 298 (9th Cir., 1961), the court specifically proposed a continuance as the remedy for the court appointment of counsel over defendant's objections in order to allow the defendant to obtain the services of the counsel of his choice. Other courts have acknowledged the right to counsel of choice in *dicta.* See *Chandler* v. *Fretag,* 348 U.S. 3, 9-10; *United States* v. *Jones,* 369 F.2d 217 (7th Cir., 1966), *cert. denied sub nom. Watkins* v. *United States,* 386 U.S. 944 (1967).

This right has been recognized in cases where the counsel of choice is a non-resident and must appear *pro haec vice.* In *Cooper* v. *Hutchinson,* 184 F.2d 119 (3rd Cir., 1950), the court found that out-of-state lawyers who had been admitted *pro haec vice* in a criminal case could not be removed from the case without violating the defendant's constitutional rights. In *United States* v. *Bergamo,* 154 F.2d 31 (3d Cir., 1946), the court specifically held that denial of the request for *pro haec vice* appearance was an abridgment of the defendant's Sixth Amendment rights:

> To hold that defendants in a criminal trial may not be defended by an out-of-the-district counsel selected by them is to vitiate the guarantees of the Sixth Amendment. 154 F.2d 31, 35.

These opinions recognize that the defendant's evaluation of effective representation of his interests is entitled to great deference. Thus a defendant's objection to court appointed counsel may well justify the dismissal of that counsel when the petitioner demonstrates that that attorney may not adequately represent his interests. See *Glasser*

v. *United States,* 315 U.S. 60 (1941) (denial of Sixth Amendment rights to allow appointment of counsel with interests in conflict with those of defendant). Court accommodation to the defendant's judgment includes an obligation to make a meaningful inquiry into defendant's objections to court appointed counsel as part of the Sixth Amendment right. See *United States* v. *Seale,* 461 F.2d 345 (7th Cir., 1972). It also requires that a request for a continuance be granted in order to allow defendant's counsel to meet prior client commitments and still represent the defendant. See *Heard* v. *Gomez,* 218 F. Supp. 228 (S.D. Tex. 1962), *aff'd,* 321 F.2d 88 (5th Cir., 1963).

The constitutional requirement of court deference and accommodation to defendant's choice of counsel cannot be lessened by a defendant's choice of an out-of-state lawyer. In *Sanders* v. *Russell,* 401 F.2d 241 (5th Cir., 1968), the court struck down a Mississippi rule limiting *pro haec vice* appearances of out-of-state lawyers and noted that a showing of good standing was sufficient to require admission before a District Court in non-fee generating civil rights cases:

> In our view the District Court must grant *pro haec vice* admissions in such cases upon a showing that an individual lawyer is a member in good standing of the bar of some state, without limitation in terms of years of practice or admission. 401 F.2d 241, 247.

In *Spanos* v. *Skouras Theatres Corp.,* 364 F.2d 161 (2d Cir., 1966) the court recognized that the increased specialization and high mobility of today's bar presented a compelling argument for allowing the admission of an out-of-state anti-trust lawyer to appear with a New York attorney

in an anti-trust suit and that the existence of a statutory cause of action included a right to its effective legal assertion:

> We are persuaded . . . that where a right has been conferred on citizens by federal law, the constitutional guarantee against its abridgment must be read to include what is necessary and appropriate for its assertion. In an age of increased specialization and high mobility of the bar, this must comprehend the right to bring to the assistance of an attorney, admitted in the resident state, *a lawyer licensed by "public act" of any other state who is thought best fitted for the task, and to allow him to serve in whatever manner is most effective,* subject only to valid rules of court as to practice before them . . . Indeed, *in instances where the federal claim or defense is unpopular, advice and assistance by an out-of-state lawyer may be the only means available for vindication.* 364 F.2d at 170 [Emphasis added].

The same reasoning certainly applies to a criminal action where the stakes for the defendant are very high indeed. And the very nature of a criminal case necessarily means that the cause is an "unpopular" one. This is even more likely in this case where the defendant has been jailed for refusal to serve in the armed forces after having been denied conscientious objector status. Whatever one may think of his action, his actions were surely highly controversial and could easily evoke highly emotional responses. Moreover, Mr. Kunstler's widespread reputation in the field of civil rights cases may well have led defendant to a judgment that Mr. Kunstler's expertise made him the attorney best suited to represent him.

The experience of the civil rights movement in the early 1960's shows the importance of freely permitting out-of-state attorneys to appear in "unpopular" cases. The Southern bar was totally antagonistic to the mere assertion of rights on behalf of blacks. See M. Frankel "The Alabama Lawyer, 1954-1964," 64 *Colum. L. Rev.* 1243 (1964). Most Southern lawyers would not represent blacks or civil rights workers arrested for violating local laws. See J. Oppenheim, "The Abdication of the Southern Bar," in L. Friedman ed. *Southern Justice* 127-135 (1965). The few lawyers who would handle civil rights cases were subject to economic pressure, disciplinary proceedings by local groups and even physical violence. See D. Pollitt, "Counsel for the Unpopular Cause," 43 *N. Car. L. Rev.* 9 (1964). It was only the availability of out-of-state counsel with the skills, interest and belief in the civil rights movement that led to vindication of the First and Fourteenth Amendment rights of local citizens. Federal courts were quick to protect the rights of those clients and their out-of-state lawyers. See *Sobol* v. *Perez*, 289 F. Supp. 392 (E.D. La., 1968), *Sanders* v. *Russell, supra, Lefton* v. *City of Hattiesburg, supra.*

The assumptions behind the decisions upholding the right of out-of-state lawyers to appear in civil rights cases apply equally in this case. It is not enough to say that some other local counsel will be able to defend the action. A defendant has the right to choose counsel who has both the skills and a sympathetic interest in his plight. Sometimes local counsel may not be willing to make certain arguments on behalf of his client which an out-of-state lawyer would gladly make. In the civil rights cases, many local counsel would not challenge the systematic exclusion of blacks from jury lists. See *United States ex rel. Goldsby* v. *Harpole*, 263

F.2d 71, 82 (5th Cir., 1959), cert. den. 361 U.S. 850 (1959). Today some local counsel may not raise the issue of prosecutorial abuse of discretion, illegal wiretap of counsel, the production of exculpatory material under *Brady* v. *Maryland,* 373 U.S. 83 (1963), or other governmental misconduct which might serve as a defense to the charges. Out-of-state lawyers familiar with such arguments may be better able to represent a client in many situations.*

Representation by counsel of one's choice, rather than unwanted appointed counsel, aids in the administration of justice in many ways. It may lead to more efficient presentation of a case if rapport exists between counsel and client. There is less likelihood of disorder in such cases. As a recent report of the Association of the Bar of the City of New York points out:

> A client who has confidence in his attorney and feels he is being properly represented is more likely to listen to his lawyer's recommendations or respond to his suggestions on how he should behave himself in the courtroom. If a defendant is represented by someone in whom he does not have faith, the danger of trial disruption is greatly increased. *Disorder in the Court, A Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct,* 136 (1973).

Thus, in terms of defendant's rights and the administration of justice, representation by out-of-state lawyers

* It should be noted that in the instant case Mr. Kunstler was able to have Mr. Banks released from prison on February 15, 1974 through a writ of habeas corpus. It is doubtful that local counsel could have or would have been able to.

should always be permitted except where some competing and compelling governmental interest can be shown.

B. *There Is No State Interest Which Justifies Denial of Respondent's Selection of Out-of-State Counsel of His Choice.*

Various reasons have been proposed to justify denial of the right to choose out-of-state counsel. They include (1) possible trial delay; (2) serious misconduct by out-of-state counsel; (3) violation of the Code of Professional Responsibility. None of these reasons are applicable in the present case.

(1) *Trial Delay*: Some courts have denied a continuance to allow defendants to obtain the services of chosen counsel when such defendants have shown lack of diligence in obtaining counsel, *United States ex rel. Carey* v. *A. T. Rundle,* 409 F.2d 1210 (3rd Cir., 1969), cert. denied, 397 U.S. 946 (1970) (denial of third continuance request by defendant after he had had over one month to obtain counsel and was unable to find a private attorney); when such defendants have demonstrated a lack of cooperation with first counsel of choice, *United States* v. *Pigford,* 461 F.2d 648 (4th Cir., 1972) (denial of motion for continuance to obtain new attorney when defendant had ignored several requests of original counsel to assist in preparation of case and where no witness subpoenas had been issued); and where such defendants have not consistently objected to appointed counsel, *United States* v. *Hampton,* 457 F.2d 299 (7th Cir., 1972) (denial or motion where defendant had previously expressed satisfaction with court-appointed counsel and requested private counsel on morning of trial due to sudden acquisition of funds for private attorney).

None of these factors is present in the instant case. Rather the government and the petitioner have attempted to thwart the consistently cooperative relationship of attorney and client by initially refusing to accommodate hearing dates to grant Mr. Kunstler a necessary 24 hours to meet his other commitments and by giving dubious notice of such hearing. There was absolutely no showing that there would have been any unnecessary delay in trying respondent's case if Mr. Kunstler had represented him.

Indeed the circumstances in which courts have refused to make such accommodations are readily distinguishable from the case at bar. In this case defendant Banks secured a commitment from Mr. Kunstler and maintained a consistent interest in being represented by him. Mr. Kunstler also demonstrated a good faith interest in representing Mr. Banks and due diligence in legal efforts on defendant's behalf. There is no proof in the record that Mr. Kunstler would not have been available for the scheduled trial of respondent in May, 1973.

(2) *Serious Misconduct*: There have been cases where serious misconduct, such as tampering with evidence, has been held to justify the denial of *pro haec vice* appearance. For example, in *United States* v. *Madsen,* 148 F. Supp. 625 (D. Alaska 1957), the court refused to allow a non-resident attorney to represent a criminal defendant after the attorney without authorization had been discovered inspecting the car in which defendant's alleged victim had been shot and where the police found that a bullet hole in the car had apparently been altered by the attorney. The court's finding that the attorney was "wholly lacking in the character requisite for an officer of the court" was indeed justified. In *State* v. *Kavenaugh,* 52 N.J. 7, 243 A.2d 225 (1968) cert.

den. sub nom. *Matzner v. New Jersey*, 393 U.S. 924 (1968), the foreign lawyer sent a letter containing outragious charges about the case to 150 state and federal officials at the eve of trial. It was widely publicized in the press. The sending of the letter violated a specific court order against pre-trial publicity. The lawyer was not permitted to appear in the case. However, the New Jersey Supreme Court's opinion suggests that the misconduct was so serious that a local lawyer would probably have been barred from appearing in the case if he had acted in the same way.

There is nothing comparable to the Kavanaugh case in this action. Mr. Kunstler's remarks were remote in time and place from the trial and violated no court order. There is no basis for relying on the Kavanaugh case to justify his dismissal from the Banks case.

(3) *Unethical Conduct*: The chief reliance of petitioner in refusing to permit Mr. Kunstler to appear in this case was on the fact that he allegedly violated the strictures on pre-trial publicity contained in DR 7-107 and Rule 27 of the District Court of the Southern District of Indiana. The simple answer to that contention is that assuming any sanction should be imposed, it must be done in disciplinary proceedings by the appropriate bar committee of a lawyer's home jurisdiction, not through denial of *pro haec vice* admission. In addition the disciplinary rule is not designed to cover the brief remarks made by Mr. Kunstler so remote in time and place from the trial. In any event if the rules are interpreted to cover this situation they violate the First Amendment, as explained in Point II below.

Petitioner quotes extensively from various reports on pre-trial publicity such as the Kaufman Committee report,

45 F.R.D. 391, and the Reardon Committee report which lead to DR 7-107. But he does not cite a single word in those reports that suggests that a proper sanction for violation of the rules is the barring of out-of-state counsel.

We have already demonstrated the importance of a defendant selecting counsel of his choice whether in or out-of-state. That interest can be overridden only by a compelling state interest such as a direct and imminent threat to the administration of justice. Nothing in the record in this case demonstrates any such threat. If the petitioner's position is upheld it would mean that any minor or insignificant deviation from the Canons or rules could serve as the basis for denying *pro haec vice* admission. For example, DR 7-106 (c)(1) forbids a lawyer from stating any irrelevant matter before a court. Should the violation of that rule lead to a defendant losing out-of-state counsel of his choice?

In addition, Mr. Kunstler's remarks did not violate DR 7-107. He commented generally about the case and Mr. Banks and made some remarks about his political philosophy. There is no hint that potential jurors in Terre Haute read or knew about the February 10, 1973 story on p. 31 of the Indianapolis Star or saw the press release introduced below. There is absolutely no showing that the state's right to a fair trial was jeopardized in any way. Mr. Kunstler did not discuss the evidence he planned to introduce nor the witnesses he planned to call. The most that could be said is that he commented on his client's innocence. But, surely such a statement constitutes a right-of-reply to the prosecutors indictment. Surely the rules were not designed to cover such remarks when intermixed with general political statements. There is simply no basis for claiming that Mr. Kunstler's remarks were so serious a violation of the rules that the fairness of the trial was threatened.

C. *The Association of Local Counsel With Mr. Kunstler Satisfied Any Legitimate Interest in Insuring Familiarity With Local Rules.*

Each federal district court has a legitimate interest in making sure that counsel is available within its jurisdiction to obtain service of papers and to be available for necessary conferences about the case. Local counsel should also be available to familiarize out-of-state counsel with local rules and practice.

If these interests are satisfied—and the record is clear that they were in the instant case—the local federal court can have no other interest in barring a defendant from selecting an out-of-state lawyer of his choice. As the New York City Bar Association states:

> While the state's need for an orderly trial is important, the right of an individual to counsel of his choice cannot be denied unless some compelling state regulatory interest can be demonstrated. The state's interest must be asserted in a reasonable manner and in our view only through the least drastic means required to protect the integrity of the court proceedings—such as requiring the association of local counsel.
>
> We conclude that a court cannot and should not bar an out-of-state lawyer from appearing if 1) he is willing to have local counsel associate himself with the case to familiarize the foreign lawyer with local practice, and to obtain service of papers, and 2) the out-of-state lawyer has no present disability or limitation on his right to practice in his own state.
> *Disorder in the Court,* supra 168.

II.

Respondent's right to counsel and due process rights cannot be abridged on the basis of his and or his attorney's valid exercise of First Amendment rights.

A. *Mr. Kunstler's Statements About This Case Are Protected by the First Amendment.*

Only speech which presents a "clear and present danger" to the administration of justice may be prohibited. *Bridges* v. *California*, 314 U.S. 252 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Craig* v. *Harney*, 331 U.S. 367 (1946); *Wood* v. *Georgia*, 370 U.S. 375 (1962). This test has led courts to find First Amendment protection for a wide range of speech both by the press and by parties involved in litigation. Such protection extends to criticism of a judge and trial procedures in a case of forcible detention, *Craig* v. *Harney, supra;* a newspaper editor's criticism of a judge if he decides to grant probation to labor union members and the publication of a telegram from a union official to the Secretary of Labor threatening a strike if the court's decree is not enforced, *Bridges* v. *California, supra;* harsh criticism of a judge's dismissal of rape case indictments, *Pennekamp* v. *Florida, supra;* issuance of press releases by a local sheriff accusing judges of race agitation during pending grand jury investigation, *Wood* v. *Georgia, supra.*

This Court in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), noted that the courts have the power and obligation to make rules to insure the fair administration of justice:

> . . . The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel

> for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. 384 U.S. at 363.

But such rules cannot be made at the expense of the valid exercise of First Amendment rights. For these reasons the Seventh Circuit has struck down a blanket prohibition on extra-judicial comment by defense counsel during pending litigation as a clear First Amendment violation. See *In re Oliver*, 452 F.2d 111 (7th Cir., 1971). In passing on the overbreadth question the court noted that its role in passing on court rules was similar to that of a court passing on statutes, and that such rules were subject to similar challenges:

> [There is a distinction between the court's adjudicative role] in which it is restricted to determining relative rights between parties clearly subject to its jurisdiction based upon facts then made known to the court, and the function of a court in an essentially legislative role, in which it adopts broad rules, perhaps having their greatest effect on parties not before it, based on facts largely anticipated. In this latter function courts should be treated more like legislatures than courts in that their rule-making decisions should be subject to the same sort of challenges permitted for statutes. 452 F.2d at 113-14.

The Seventh Circuit has also struck down an overbroad court order prohibiting defense attorneys from making statements in a criminal case arising under the Selective Service Act while recognizing the "clear and present danger" test for determining the validity of such rules:

> We hold that before a trial court can limit defendants' or attorneys' exercise of First Amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is "a serious and imminent threat to the administration of justice." *Chase* v. *Robson,* 435 F.2d 1059, 1061 (7th Cir., 1970).

And other courts have struck down as overbroad court rules dealing with First Amendment press rights. See *Dorfman* v. *Meiszner,* 430 F.2d 558 (7th Cir., 1970) (court rule prohibiting photographs in courtroom and environs held to be overbroad); *United States* v. *Dickinson,* 465 F.2d 496 (5th Cir., 1972) (court order prohibiting reporting of testimony taken in open court hearing to determine the legitimacy of state prosecution held to be overbroad).

A narrow test for such prohibitions is necessary because both the government and the public have an interest in inviting public interest in and comment on the operation of the criminal justice system. In *In re Sawyer,* 360 U.S. 622 (1959), the Supreme Court took specific note of the interest in permitting the out-of-court speech of a defense attorney in a Smith Act case, noting that such speech could be part of a healthy criticism of the law:

> We start with the proposition that lawyers are free to criticize the state of the law. Many lawyers say the rules of evidence relative to the admission of statements by those alleged to be co-conspirators are overbroad or otherwise unfair and unwise; that there are dangers to defendants, of a sort against which trial judges cannot protect them, in a trial of numerous

> persons jointly for conspiracy; and that a Smith Act trial is apt to become a trial of ideas. Others disagree. But all are free to express their views of these matters . . . And surely permissible criticism may as well be made to a lay audience as to a professional; oftentimes the law is modified through popular criticism. 360 U.S. at 631.

The public often views the prosecution as representing the public interest and does not always maintain the presumption of innocence against the accused. For this reason, a brief comment by the accused or his attorney maintaining his innocence serves a useful purpose by reminding the public of the presumption of innocence. See Goldstein, "The State and the Accused: The Balance of Advantage in Criminal Procedure," 69 *Yale L.J.* 1149 (1960). It cannot be considered a "serious and imminent threat to the administration of justice." Thus, it cannot serve as the basis for any disciplinary sanction and surely not as the basis for depriving a defendant of the Sixth Amendment right to counsel of his choice.

Thus, DR 7-107 and Rule 27 cannot be interpreted to forbid a brief comment on the innocence of the accused by his attorney at any time. It surely cannot be invoked to punish such remarks intermixed with protected First Amendment statements made by an attorney months before a trial and reported in a back page of a newspaper 95 miles from where the case is to be tried. Nothing in the *Sheppard* opinion justifies such a broad expansion of any pre-trial publicity rule.

The petitioner also focuses on Mr. Kunstler's remark urging Mr. Banks' supporters to come to the trial. Mr. Kunstler did not urge that supporters disrupt the proceeding in any way. There is no law or rule or regulation that forbids lawyers from urging a defendant's friends or supporters to attend his trial. Such a comment cannot serve as the basis for any sanction whatsoever, let alone the loss of defendant's Sixth Amendment rights.

B. *The Political Views of Respondent and His Attorney Are Protected by the First Amendment and Cannot Be Made the Basis for Abridgement of Sixth Amendment Right to Counsel.*

Judge Holder's inquiry into Mr. Kunstler's political views and those of the respondent, and his open disapproval of those views, cannot be made the basis for denying Mr. Kunstler admission *pro haec vice* to the Indiana federal district court. This Court has squarely held in *Baird* v. *State Bar of Arizona,* 401 U.S. 1 (1971), that political belief or membership in political organization cannot be used as the basis for the denial of access to a profession, specifically the practice of law:

> The First Amendment protection of association prohibits a state from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs. 401 U.S. 1, 6.

See also, *United States* v. *Robel,* 389 U.S. 258 (1967); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967).

Moreover, this Court has consistently held that the practice of law cannot be restricted in violation of federally

protected rights. See *Sperry* v. *State of Florida ex rel. the Florida Bar*, 373 U.S. 379 (1963) (state regulation of practice of patent law cannot restrict federal regulations). And whether the practice of law is viewed as a "right" or a "privilege", regulatory rules that arbitrarily restrict that right are constitutionally invalid. See *Schware* v. *Board of Examiners of New Mexico*, 353 U.S. 232 (1957).

CONCLUSION

It is impossible to escape the conclusion that Judge Holder refused to permit Mr. Kunstler to appear in this case because he did not approve of Mr. Kunstler's controversial views. Whether or not a judge approves of a lawyer's views and whether or not he thinks a defendant would be better off with a different attorney, he cannot arbitrarily deny that defendant counsel of his choice. Mr. Kunstler's comments were so far removed from what the fair trial-free press rules were designed to cover that they cannot lead to any proscription, let alone the sanction that was enforced here. Under the guise of protecting the fair trial-free press rules, petitioner urges this Court to jeopardize the rights of lawyers and clients throughout the nation to secure counsel of their choice. If this Court reverses the decision below, it will strike a more serious blow to the fair administration of justice than any evil associated with pre-trial publicity. This Court should not jeopardize the rights of all Americans because it might disapprove of the comments of a single controversial lawyer.

For the reasons set forth above, the judgment below should be affirmed.

Respectfully submitted,

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April 1974

FILED
APR 12 19
MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-841

HON. CALE J. HOLDER, United States District Judge for the Southern District of Indiana,

Petitioner,

v.

ARTHUR BANKS,

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III. A UNITED STATES DISTRICT JUDGE MAY NOT DENY ADMISSION *PRO HAC VICE* TO AN OTHERWISE QUALIFIED ATTORNEY BECAUSE OF THE JUDGE'S POLITICAL DISAGREEMENT WITH COUNSEL OR HIS STATED BELIEF THAT THE POLITICAL VIEWS OF THE ATTORNEY WOULD ENDANGER THE DEFENDANT'S RIGHT TO A FAIR TRIAL, PARTICULARLY WHERE THE DEFENDANT, BEING FULLY ADVISED THEREOF, INSISTS UPON REPRESENTATION BY SUCH ATTORNEY . . . . . .

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-841

HON. CALE J. HOLDER, United States District Judge for the Southern District of Indiana,

Petitioner,

v.

ARTHUR BANKS,

Respondent.

BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

Petitioner, a United States district court judge who is represented in this Court by private counsel,[1] has sought to paint the picture of this case as one which centers on

[1] The Solicitor General evidently considered appearing on behalf of Petitioner. Indeed, he filed for and obtained an extension of time within which to file a Petition for a Writ of Certiorari. Thereafter, no appearance has been made in this case by the Solicitor General.

William M. Kunstler and whether he has the right to engage in conduct claimed to be in violation of court rules and ethical standards relating to pre-trial publicity.

This effort permeates the brief of the Petitioner to such an extent that there is hardly any mention of the factual and legal basis for what we submit are the main issues in this case, and the only ones to which the Court can or need address itself on the record before the lower court, namely, the right of Arthur Banks to be represented by counsel of his choice, even one who is disliked by the district court judge because of his political views.

The case has been offered to the Court as one on which it may pass upon the new Fair Trial-Free Press rules. For that reason, our "Counter-Statement of the Questions Presented" includes questions in that area although, as we have indicated above, we do not believe that the Court need go beyond the questions of the Sixth Amendment right to choice of counsel, as that right interacts with the defendant's and counsel's First Amendment rights.

Moreover, the factual presentation in Petitioner's brief as to what Mr. Kunstler in fact did is so distorted, and at the same time is so completely silent as to the statements and comments of the Petitioner from the bench which preceded and revealed his reasons for his refusing to permit Mr. Kunstler to represent Mr. Banks, that a detailed "Counter-Statement of the Case" is necessary. That statement is set forth below directly following our "Counter-Statement of the Questions Presented."

ADDITIONAL COURT RULES INVOLVED

Rule 29 of the Rules of the United States District Court for the Southern District of Indiana provides as follows:

RULE 29

The Conduct of Judicial Proceedings in Criminal Cases. Special Orders in Widely Publicized and Sensational Cases.

"In a widely publicized or sensational case, on motion of any party or on its own motion, when the court deems it necessary, in order to preserve decorum and to maintain the integrity of the trial, the court will issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the court may deem appropriate for inclusion in such an order. Such special order may be addressed to some or all, but not limited to the following subjects:

(1) A proscription of extrajudicial statements by participants in the trial, including lawyers, parties, witnesses, jurors, and court officials, which might divulge prejudicial matter not of public record in the case.

(2) Specific directives regarding the clearing of entrances to and hallways in the courthouse and respecting the management of the jury and witnesses during the course of the trial to avoid their mingling with or being in the proximity of reporters, photographers, parties, lawyers, and others, both in entering and leaving the courtroom and courthouse, and during recesses in the trial.

(3) A specific direction that the jurors refrain from reading, listening to, or watching news reports concerning the case, and that they similarly refrain from discussing the case with anyone during the trial

and from communicating with others in any manner during their deliberations.

(4) Sequestration of the jury on motion of any party or the court, without disclosure of the identity of the movant.

(5) Direction that the names and addresses of the jurors or prospective jurors not be publicly released except as required by statute, and that no photograph be taken or sketch made of any juror within the environs of the court.

(6) Insulation of witnesses from news interviews during the trial period.

(7) Specific provisions regarding the seating of spectators and representatives of news media."

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether in the federal system a district court judge has the power to deny *pro hac vice* admission to a member in good standing at the federal bar in his home state?

2. Whether the trial court had the power to deny to the defendant counsel of his choice, by denying *pro hac vice* admission to his attorney, where the record is clear that the asserted grounds for such denial, namely, a) a possibility of delays in future proceedings, and b) a claimed violation of court rules regarding communications to the media, are unfounded?

3. Whether a trial court has the power to deny to a defendant counsel of his choice, by denying *pro hac vice* admission to his attorney, because of a trial judge's disagreement with some of the views on controversial issues of said counsel and the trial court's asserted opinion that such representation would inure to the detriment of the said defendant, where the defendant is fully apprised of his counsel's views and makes it entirely

clear that, knowing such views, he still wishes to be represented by the said attorney?

4. May a criminal defendant be denied counsel of his choice because his attorney at a public meeting invited his audience to attend the trial?

5. Has the defendant in this case been denied a speedy trial?

If the case is not resolved upon the foregoing questions and the Court considers the so-called Fair Trial-Free Press issue, then we would suggest the following additional questions:

6. Whether court rules adopted to regulate public statements by counsel may be enforced by means other than the discipline of counsel, and specifically whether thay may be enforced in this case in such manner as to deny to defendant the right to counsel of his choice where it is clear that the facts would not have supported disciplinary sanction against counsel and where it is also not established that denial to defendant of counsel of his choice was necessary to control counsel's future conduct?

7. Assuming that under any circumstances, counsel for a defendant may be restricted in the exercise of his First Amendment rights in so far as concerns comments about a pending criminal case, may such a restriction be imposed by a blanket rule applicable to all litigation, not tailored to particular needs and without any determination that the application of such a rule in a particular case is in fact demonstrably necessary in order to avoid interference with a fair trial or other prejudice to the orderly or fair administration of justice?

8. Assuming the answer to the foregoing question is in the affirmative, whether Rule 27 of the United States District Court for the Southern District of Indiana is not unconstitutional on its face and as applied, in that:

(a) The rule restricts First Amendment expressions too broadly and there are available less drastic means to achieve the necessary ends?

(b) The rule employs an impermissible standard for regulating speech, *i.e.*, a "reasonable likelihood" instead of a "clear and imminent threat" to fair and orderly administration of justice?

(c) A defendant's counsel may not, under the First and Fifth Amendments, validly be barred from making public statements, particularly where enforcement officers and others connected with the prosecution are free to make public statements which may color media perception of the case?

COUNTER-STATEMENT OF THE CASE

Respondent's incarceration and the background of the charges against him.

Respondent, a 26-year old Black actor and playwright, was sentenced to a term of five years for draft refusal after being denied conscientious objector status.[2] The

[2] Respondent's affidavit filed in the Court of Appeals for the Seventh Circuit on September 6, 1973, in opposition to Petition for Rehearing (hereinafter designated "Respondent's Affidavit"), p. 2; see also, testimony before Judge Holder taken on April 1, 1973 (hereinafter designated "Tr.") pp. 108-109.

Respondent has lodged with the Clerk of the Court ten xerox copies of papers fastened together, containing (1) the stenographic transcript of all hearings before the district court, (2) the Petition for Mandamus, and (3) the motion for discovery which the court had said would be considered on April 1 and which was an exhibit attached to the Mandamus Petition. Respondent believes each member of the Court will wish to examine the proceedings and exhibits above enumerated and accordingly has made these xerox copies available for the convenience of the Court. They will hereafter be referred to as the "lodged papers." A copy of the lodged papers has been forwarded to the adversary counsel. All the foregoing documents are in the record filed with the Court.

penalty was the maximum allowable by law and was far in excess of that commonly given at the time Respondent was sentenced.[3]

When he was first imprisoned on November 10, 1971, the Respondent was placed in the federal correction institution at Danbury, Connecticut, a medium security institution. Thereafter, on July 3, 1972, Respondent was transferred to the federal prison at Terre Haute, Indiana, a maximum security institution.[4]

In that institution an incident occurred on August 22, 1972, which has been described in a document introduced by the Government in the lower court as follows:

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[3]At the time Respondent received his five-year sentence, October, 1968, the average sentence for draft refusal was 36.3 months and each year thereafter it has been reduced so that for fiscal year ending in 1972 the average sentence was 22.1 months. See Annual Reports, Administrative Office, U.S. Courts, on Federal Offenders. Selective Service Law Reporter, p. 6029.

The incongruity of the government's treatment of Mr. Banks is revealed in the fact that "[i]ronically, while one arm of the Federal Government has Burghardt [Banks] locked up, another, The National Endowment For The Arts, has granted him $7,000 to work on a movie on Frederick Douglass. Burghardt is trying to write the screenplay in prison. But as Burghardt himself said to one of his defense attorneys, 'They are killing me.'" See Exhibit D, excerpt from *Time* magazine, February 26, 1973, introduced by the government at the April 1 hearing before Judge Holder. See exhibits appended to this brief.

Respondent was awarded a $7500 matching grant from The National Endowment For The Arts for the foregoing purpose, and it has so far been held by the Cultural Council Foundation of New York pending his release from prison.

[4]The only statement in the record as to the reasons for this transfer appears in the *Time* article referred to *supra*, n. 3; apparently it was contended that Mr. Banks "helped lead a strike against inmate working conditions," so he was put in solitary confinement for five months and then transferred to Terre Haute, Indiana.

"A fight broke out in the prison yard between two inmates, one black and one white. When the prison guards broke up the fight, they led only the black inmate away to be disciplined. A crowd of 200 blacks gathered to protest, Burghardt among them. Later that evening he was summoned to the warden's office and refused to go. Guards used chemical spray and rubber truncheons to subdue him, then took him to solitary. Three guards were injured in the fight. Two of these 'assaults' were handled administratively; for the third, Burghardt now faces another trial, probably in April or May, and a possible additional sentence of three years."[5]

It was during the course of the transfer of Respondent from his cell to the "punitive segregation unit"—solitary confinement—that the alleged assult of the guard occurred. Mr. Banks states that as a result of this incident, he was "stripped naked and needlessly thrown by guards" into a strip cell on "punitive segregation G." (Respondent's affidavit, p. 4.) Respondent remained in solitary confinement in Terre Haute from August 22, 1972 until November 12, 1973, when he was finally moved to Sandstone, Minnesota.[6]

The indictment and events up to April 1, 1972, including pretrial proceedings.

On December 17, 1972, almost four months after the alleged incident, Respondent was indicted for assault and battery against a guard, allegedly committed in the course

[5] *Time* article, *supra*, n. 3.

This obviously is not the time or place for Respondent to state his view of the incident, and Respondent in no way accepts the characterization in the *Time* article or the charges against him.

[6] Respondent had two intermediate stays at Sandstone, namely, April 3 to May 3, 1973 and June 18 to June 23, 1973.

of the August 22 incident. The trial on the one-paragraph indictment[7] is the source of the issues which thereafter developed.

As soon as Respondent was given an opportunity to communicate from solitary confinement with the outside world, he wrote to his friend, Denise Spalding, and through her ten days later (September 2) received a visit from one Morris B. Blumberg, an attorney from Terre Haute (Respondent's affidavit, p. 4). Even before that, however, he was interviewed by the F.B.I. (*id.* at 5). On September 6 and 13, Respondent received a "Good Time Forfeiture Hearing" at which he was denied counsel or an opportunity to call witnesses, and as a result, all his good time was forfeited (*id.* at pp. 7-8).

Respondent, who had been warned by prison authorities that an indictment "most likely" would be forthcoming (*id.* at pp. 10, *et seq.*), was receiving counsel from Mr. Blumberg until he became involved "almost continually" in another case in Florida (*id.* at p. 13). During the Fall, after he had been warned of the impending indictment, Respondent asked Ms. Spalding to seek out Mr. Kunstler, who expressed interest but was then otherwise engaged and could not commit himself; besides, there was no indictment at the time (*ibid.*)

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[7] "The Grand Jury charges that:

"On or about the 22nd day of August, 1972, at the United States Penitentiary, Terre Haute, Indiana, in the Southern District of Indiana, ARTHUR C. BANKS, did forcibly assault, resist, oppose, impede, intimidate and interfere with Harold J. Roberts, a Safety Officer of the Federal Bureau of Prisons, employed at said penal and correctional institution, while said Harold J. Roberts was engaged in the performance of his official duties.

"All in violation of Title 18, United States Code, Section 111."

On December 17, Respondent was indicted. On December 20, he was taken out of solitary confinement to a night-time arraignment before Petitioner (Tr. 2) and advised the court that Mr. Blumberg and Mr. Kunstler were his counsel and that Mr. Blumberg was in Florida and Mr. Kunstler on the East Coast (*id.* at 4). Mr. Banks designated Mr. Blumberg as his "chief counsel in this case" (*ibid.*) whom he had retained and paid a fee (*id.* at 6). Despite Respondent's mention of Mr. Kunstler as having been his lawyer on December 20, subordinate to Mr. Blumberg, it is beyond dispute that Mr. Kunstler had not at the time finalized any agreement to represent Respondent, as indeed he could hardly have been expected to do until February 9 when Mr. Kunstler met Mr. Banks for the first time in the penitentiary (*id.* at 110). The mention of Mr. Kunstler's name, however, evoked the following comment from the Petitioner: "Mr. Clerk, have you heard from Mr. Kunstler, this world traveler?" (*id.* at 5.) At the arraignment, the clerk mentioned that he had heard from a Mr. Barnhart, who said he had heard from "friends of Mr. Banks" and that he was to be Respondent's lawyer. Respondent advised the court that he did not know Mr. Barnhart and had paid Mr. Blumberg (*id.* at 8-9).

The court entertained and granted Respondent's oral motion for continuance, to which the government raised no objection, and continued the arraignment "indefinitely".

On January 2, Respondent was again taken in for arraignment. Mr. Brent Barnhart entered an appearance as local counsel for Mr. Banks and explained that "He [Respondent] has expressed to me a desire to have another counsel as chief counsel or counsel to handle the trial and prosecution of this case" (*id.* at 14). Mr. Barnhart explained that he had been contacted and hired

by Mr. Banks' family and did not feel "competent at this time to proceed as trial counsel" (*ibid.*). The court continued the arraignment and, while admonishing Mr. Banks and Mr. Barnhart to be fully represented at the next hearing, did not act on Mr. Barnhart's request to establish a date certain for the next arraignment (*id.* at 15).

An arraignment was again scheduled for February 2. Mr. Barnhart was present and explained that "Mr. Kunstler is . . . trial counsel Mr. Banks has chosen" and he wished to be there for the arraignment (*id.* at 19). The court rejected any plea for further postponement of the arraignment and entered a plea of not guilty and an order for pretrial discovery (*id.* at 19-20). The court indicated that the case "would be set for trial by the Judge who comes here in May" (*id.* at 19).

On February 12, Mr. Barnhart, on behalf of Mr. Banks, filed motions for a bill of particulars and for discovery and inspection (*id.* at 189). On February 14, the government moved to advance the trial of this case to an early date, no specific date being suggested (*id.* at 191). On February 15, the court responded with a letter to the U.S. Attorney indicating that the time for trial was not then "predictable" since the "discovery and inspection phase of the action has just commenced on February 12, 1973." On March 5, the government filed a motion to strike defendant's motions for a bill of particulars and for discovery and inspection.[8]

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[8]The motion to strike was based on the unusual assertion that it had been signed by "local counsel" and that Mr. Banks had said that Mr. Kunstler would be his "trial counsel" and that for some unexplained reason that fact put the government in a position of being "unable to effectively respond to the pleadings of his local counsel, and particularly, to effectively entertain any discussion of the requested information." As will later appear, Mr. Kunstler's

It will be observed that prior to March 15, Mr. Kunstler's name had been mentioned in court only in terms of his ultimate handling of the trial and his wish to be present at arraignment. While the arraignment might have been slightly delayed, Mr. Barnhart was proceeding with all deliberate speed to represent the Respondent's interest in the pretrial proceedings. Up to March 15, the court had not set a date for a hearing on the pretrial issues and of course had not set a date for the trial, and there was nothing to indicate that retention of Mr. Kunstler would cause delay in the trial. The motions filed by Mr. Barnhart, however, gave a clue to the vigor of the defense which would be presented. The discovery motion, in particular, which had been filed by Mr. Barnhart after consultation with Mr. Kunstler, gave ample demonstration, by the kinds of evidence it was searching out, that defendant and his counsel were mounting a major defense which would involve and reveal a great deal about the inner workings of the Terre Haute penal institution (see Exhibit C to Petition for Mandamus, included with lodged papers).

On March 15, the government filed a motion for the appointment of trial counsel. On March 21, Mr. Kunstler's motion for leave to appear as counsel and notice of appearance were filed.[9] On the same day, the government

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status as counsel was not finally resolved until February 9 and he had not as of February 12 even filed his motion for leave to appear, and hence could not have signed these pretrial motions. In any event, no one on the defense side had ever indicated any limitations on Mr. Barnhart's authority to handle pretrial matters.

[9]Mr. Kunstler had understandably not finally accepted Mr. Banks' request that he represent him until February 9, the first day he had been able to confer with him (Tr. 109). Mr. Kunstler prepared a notice of appearance, dated February 27, and forwarded it to Mr. Barnhart for filing. For some unexplained reason, it was not filed until March 21 (*id.* at 76-77).

moved for a hearing on Mr. Kunstler's motion (Tr. 198). The government's motion gave no clue as to what, if any, issues would be raised in respect to Mr. Kunstler's application for *pro hac vice* admission.

On March 23, the clerk prepared an order fixing a hearing for Friday, March 30, on all the foregoing pretrial motions, *i.e.*, bill of particulars, discovery, and the government's motion to appoint counsel (*id.* at 200). Earlier, the trial judge had indicated to the clerk that the case would be tried on the May 1973 calendar (*id.* at 199).

Neither Mr. Kunstler nor Mr. Barnhart could make the March 30 date because of prior commitments, and by telephone communication with the clerk asked if the court could move the hearing "to the 2nd or 3rd of April [Monday or Tuesday] or any time the first part of April" (*id.* at 203). The court in response continued the hearing to Saturday, March 31 (*id.* at 205). That date, too, presented calendaring problems, and on March 29 Mr. Allison (Mr. Barnhart's partner) presented a motion for continuance, explaining in detail why the March 31 date was not possible and the short notice that had been received (*id.* at 32). He suggested that if the court could not continue the matter until April 2 or 3, it might set the hearing for Sunday, April 1. The court adopted the suggestion (*id.* at 71), but not until it had made a 36-page statement (*id.* at 35-71) which alleged the existence of statements in the record which are in fact not there.[10]

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[10]At Tr. 40, Petitioner quotes Respondent as saying at his first arraignment in December 1972, "I don't want this lawyer, and I have a lawyer, and his name is William Kunstler." And see Petitioner's repetition of this statement at Tr. 64. No such statement appears in the record. Rather, the record shows that Respondent stated that he had hired Mr. Blumberg as his chief

The government opposed the motion because "we must, as a matter of record, strenuously object to any further delay which would deprive the defendant Banks of counsel for even twenty-four hours" (*id.* at 31).

It will be observed that the court had indicated to the clerk that it intended to try the case in May. There was no suggestion whatever that Mr. Kunstler would not be in a position to try it then. Nor was there any suggestion that Mr. Kunstler, with Mr. Barnhart, was not fully prepared to deal with the pretrial discovery issues set for consideration on April 1 or complete pretrial discovery

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counsel and had paid him a fee and that Mr. Kunstler was also retained (see p. 9, *supra*).

At Tr. 45, Petitioner referred to Mr. Barnhart "whom we have been advised personally on the record, who personally himself, Mr. Banks, says is not his lawyer, except he regards him as a very secondary capacity, as playing second base." Petitioner's characterization of Mr. Barnhart is not found in the record (see Tr. 14). When Mr. Allison, in response to the judge's comment about Mr. Barnhart, asked, "Your Honor, is it a rule of the local Court that local counsel may not sign pleadings for trial counsel?", the court responded: "Did you hear what I just said? You follow me, because you are already resisting, opposing what I am trying to get across to you." (*Id.* at 45.)

Again, there is the Petitioner's statement at Tr. 62:

> "Let me put the English on it, here, the big casino now: Can you tell me why—can you tell me why, Mr. Barnhart—I mean Mr. Allison—Mr. Kunstler didn't enter his appearance long before this date—or make application for it—the 21st of March."

And Petitioner, never having met Mr. Kunstler or given him any opportunity to explain, proceeded by posing rhetorical questions to draw some unsupported inferences:

> "Why couldn't he enter an appearance? Did he want to make these speeches without having any obligations as counsel of record? Or was he afraid of the Free Press Fair Trial Rules of the—where he couldn't make speeches about his client when he had an appearance on file, or something like that?"

matters thereafter. In fact, Mr. Allison, in response to an inquiry from the judge, assured the judge that Mr. Kunstler and Mr. Barnhart would be prepared to argue all the motions set for the hearing (*id.* at 67).

At the hearing on March 29, when Mr. Allison appeared to request a rescheduling of the hearing day, the judge and the U.S. Attorney, though obviously not required to do so, and though they had never met Mr. Kunstler, made some extended remarks which were reported in the local press, to some extent inaccurately. Mr. Kunstler referred to a newspaper report of these remarks at the April 1 hearing (*id.* at 81 *et seq.*), the transcript not then being available. Mr. Kunstler's comments are dealt with below.

The April 1 hearing.

Mr. Kunstler presented himself to the court and set forth his credentials, including the fact that he has been a member of the bar of the State of New York since 1948, has practiced before many federal and state courts, had never been disciplined in any court of the United States (noting that a contempt conviction in Chicago had been reversed), had been an assistant professor of law at New York Law School and written for law journals, and that his professional experience includes practically every kind of criminal case ranging from disorderly conduct charges to murder (*id.* at 76-79). His statement was supported by an affidavit.

At this point, Mr. Kunstler referred to the newspaper report of the hearing on the preceding Thursday. The comments which Mr. Kunstler referred to were that:

a) Mr. Kunstler was apparently more concerned in "making speeches than in representing the defendant" (*id.* at 81). Mr. Kunstler denied this, and indicated that it should not have been said out of his presence, and had a serious effect on the defendant in that "it can serve to

prejudice this defendant in the eyes of the potential jury that may hear this case" (*id.* at 83).

b) The judge was not concerned with Mr. Kunstler's "show business," which Mr. Kunstler indicated was "unfair to this defendant." Apparently this reference was to the fact that Mr. Kunstler was addressing two law schools (*ibid.*).

c) That Mr. Banks was "number forty-nine on my list of cases" (*id.* at 84), which Mr. Kunstler said was "totally untrue."

d) The judge also said that Mr. Kunstler "was a world traveler, trying to solve the problems of the world and that the defendant was secondary." (*id.* at 85-86.) Mr. Kunstler denied this and added:

> "I don't think remarks like this add much to the cause of justice, or any way help him, but in fact hurt him." (*id.* at 86.)

Mr. Kunstler further stated to Petitioner:

> "I want very seriously to represent Arthur Banks in this case. . . He has requested me and Mr. Barnhart to represent him. I gave it serious consideration, and even came out here to interview him prior to even saying that I would consider it.
>
> "I want to do that . . . I thought I had followed the law in filing or sending out a notice of appearance. I have been working on the case since that time.
>
> "The scheduling of trial I think will have to at least be done with some view to other engagements of mine that might in some way come a little bit before this case. They are not forty-eight in number in any manner of means. Many of those forty-eight are not even trial cases; some of them are one-day hearings here, one-day hearings there. . .
>
> "Arthur Banks is perfectly willing to waive any speedy trial claims he might have in this case. He is perfectly willing to waive all benefits that may

accrue to him on motion practice via rules of this District Court. He has expressed a strong feeling that I represent him, along with Mr. Barnhart, both as trial counsel—not just as a local counsel and a visiting attorney, but as two equal trial counsel in this case. . .

"I am ready to try this case." (*Id.* at 90-92)

Mr. Miller for the government recounted the facts with respect to the arraignment, as set forth above, and corrected errors in the newspaper article referred to by Mr. Kunstler,[11] describing the March 29 hearing. The article mistakenly attributed to the judge the first two of the comments noted above (*supra*, p. 15). Mr. Miller quite properly pointed out that *he*, not the judge, had made those statements (Tr. at 98-99).

Mr. Miller then proceeded as follows:

"We don't know whether Mr. Banks under the circumstances of this case, wants Mr. Kunstler to represent him . . . We don't know if Mr. Banks still wants Mr. Kunstler. We don't know whether Mr. Banks would want this case to proceed if someone else handled the discovery besides Mr. Kunstler." (*Id.* at 99-100.)

Following that, Mr. Miller stated that Mr. Kunstler had appeared at a "press conference in Indianapolis on February 9, 1973 at which time he did not appear formally in this case and an article appeared in the paper concerning statements that Mr. Kunstler made." This article, under John Bancroft's name, had appeared on

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[11]Mr. Kunstler had carefully explained that, "I am only going by newspaper clippings and Your Honor will correct me if I am wrong" (Tr. 81) and "I hate to use the newspaper, because I haven't read the record here, but it's all I have" (*id.* at 85).

page 31 of *The Indianapolis Star* on February 10. It was the subject of detailed testimony below.

Mr. Miller for the government put the issue thus:

> "Now here again, as we know, in a jury trial the jurors are among those who are seated in the courtroom. I have stated before, and I will state again, that we are concerned about a fair trial for the defendant . . . Is it possible to have a fair trial when the jury is alienated towards trial counsel? Does Mr. Banks, who is here in person, want Mr. Kunstler to represent him, if he is going to suggest to the media that there might be some sort of reaction which would intimidate jurors and alienate them to Mr. Banks and to Mr. Kunstler?
>
> "These are the questions which I believe should be answered today. And *the only question, of course, is providing Mr. Banks with a fair trial.*" (Tr. 101-102; emphasis added.)

There was never any proof that Mr. Kunstler had attended a press conference in Indianapolis on February 9; the proof was that he had spoken to a lone reporter who sought him out at a cocktail reception (see p. 20, *infra*).

In any event, in response to the statements attributed to him on February 9, Mr. Kunstler said:

> "But in any event, I don't think that that statement is actually relevant to my ability to serve here. I have a right to make First Amendment statements. I made this. I was not in the case at the time I made it, but I think I would have the right to make it if I were in the case. I think that's irrelevant, whether I had filed or had not filed, under the Seventh Circuit opinion, unless we have a hearing and Your Honor finds after that hearing, specifically, that there was a serious and imminent threat to the administration of justice.

"If Your Honor finds that, then we have an issue we can treat in the appellate courts and at least you have followed the Seventh Circuit's admonition." (Tr. 105-106)[12]

Mr. Banks, who had been in court during the entire argument, then took the stand (*id.* at 109-27), reiterated his firm insistence that he wished Mr. Kunstler to be his trial counsel (*id.* at 112), and expressly waived any speedy trial objection in the event a problem of "conflicting schedule" caused any delays (*id.* at 111). In response to a question on cross-examination, he even indicated a willingness to accept a possible delay from May until September (*id.* at 118), although there was nothing in the record indicating that Mr. Kunstler would not be able to try the case in May. Mr. Banks also made

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[12]Earlier Mr. Kunstler expounded in more detail his understanding of the law as enunciated in *Chase v. Robson*, 435 F.2d 1059 (7th Cir., 1970):

"I think that Chase versus Robson is the law in the Seventh Circuit, in which this Court sits, and I intend to be guided by Chase v. Robson in this case. I think that Your Honor is bound by it, as we are bound by it, and that any press restraints in this case must contain a clear, specific finding, following a hearing, that there is a 'clear and imminent threat to the administration of justice' before they are Constitutionally valid.

"So my filing or not filing a notice of appearance had nothing to do with it. I would have said the same thing I said—or may say in the future—whether I had filed a notice or had not filed a notice, because I had in mind and will continue to have in mind what the Seventh Circuit has told me is the law in this respect.

"Your Honor indicated—or the papers say that Your Honor indicated—that maybe I didn't file because I was attempting to avoid restrictions placed on attorneys about what they may say in public about a case. That is totally untrue. I respect the Seventh Circuit, and will totally live up to its mandate in Chase versus Robson." (Tr. 88-89)

clear that he would accept the fact, if it so developed, that Mr. Barnhart might be "the only one who physically participates in the discovery proceedings" (*id.* at 117).

The final questions and answers on cross-examination were as follows:

> "Q Well, then there's nothing you have heard here today which would change your mind about Mr. Kunstler's representation of you?
>
> A No, sir.
>
> Q Nothing about his methods or his opinions?
>
> A His qualifications, his methods, or his opinions are consonant with mine." (Tr. 126-27)

The government then put on its evidence, which consisted exclusively of the following:

1. John Bancroft, a reporter for *The Indianapolis Star* (*id.* at 128), who testified that he had interviewed Mr. Kunstler at the law office of Allison & Barnhart on February 9, 1973, and as a result wrote an article that appeared the following day on page 31 of the *Star*. This article, which was marked in evidence as Exhibit A (Tr. 133), is reproduced in full at the end of this brief. Rather than attempting to summarize the contents of the four exhibits included in the trial, we have set all of them forth in full as exhibits to the brief so that the Court may most conveniently read them in full.

Mr. Bancroft readily acknowledged that he had not been at the "Third World Student Conference" (a meeting of high school students addressed by Mr. Kunstler, see *infra*, p. 64) so that statements attributed to Mr. Kunstler's appearance there were hearsay (id. at 132). Mr. Bancroft explained that the occasion of the interview was a reception with Indianapolis lawyers where he had sought out Mr. Kunstler and asked him for an interview (*id.* at 135), that Mr. Kunstler did not seek the interview ("I [Kunstler] didn't go looking for you; you looked for

me" [*id.* at 143]), that the interview was an accurate summary of Mr. Kunstler's statements and that his reference to "blowing up the court" was a "facetious remark" (*id.* at 142) in explanation of the fact that while Mr. Kunstler wished the third world students to support the case and to draw attention to the trial, he was making clear that he wished conduct which was not violent (*ibid.*).

On cross-examination by Mr. Kunstler, Mr. Bancroft made absolutely clear that Mr. Kunstler in no way sought to have Mr. Bancroft print the story: "It was my city editor's idea," and the interview happened at a cocktail party where there were no other reporters present (*id.* at 144-45).

No proof was offered as to the circulation of *The Indianapolis Star* in Terre Haute, nor was there any testimony that anybody in Terre Haute had seen Mr. Bancroft's article. The Court should know that Terre Haute is 95 miles from Indianapolis, that the two cities are in different divisions of the Sourthern District of Indiana, and of course have separate jury rolls.[13]

2. The government also offered in evidence what appears to be a press release issued by the "National Committee to Free Arthur Burghardt Banks." This

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[13]28 U.S.C., Sec. 94, establishes the following four divisions for the Southern District of Indiana: Indianapolis, Terre Haute, Evansville, and New Albany. Consistent with the provisions of 28 U.S.C., Sec. 1861 *et seq.*, a jury plan has been put into effect for the United States District Court for the Southern District of Indiana providing for separate jury rolls for each of the divisions. See Section 7 of the plan for the random selection of grand and petit jurors, pursuant to the Jury Selection and Service Act of 1968, approved August 5, 1968.

statement, identified[14] in the record as Exhibit B, is reproduced in full among the exhibits appended to this brief. It has a dateline of February 9 and includes certain comments by Mr. Kunstler about Mr. Banks. No proof was offered as to 1) who received the press release, 2) whether it resulted in any publicity, 3) when Mr. Kunstler made the quoted statement, to whom, or whether he had authorized inclusion of his statement in the press release, or 4) whether the press release was issued in New York, which is apparently the location of the Banks Committee, in Terre Haute, or any other place.

The manner in which this item came into the record is of particular interest:

> "MR. MILLER: Your Honor, earlier this morning you referred to an affidavit filed by Mr. Kunstler, relating to some of the information that he had given at a press conference.
>
> THE COURT: Yes, sir?
>
> MR. MILLER: I would like that to be identified, and the Court take judicial notice of that as part–
>
> THE COURT: This is the April 1st affidavit or–that's the one that was filed this morning? Is that what you are referring to?
>
> MR. KUNSTLER: Only one I filed, Your Honor.

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[14]Although, as appears above, Exhibit A was formally introduced in evidence, Exhibits B, C, and D were merely marked for identification and there does not appear to have been a formal admission of them into evidence. Nevertheless, Exhibits A, B and C (but not D) bear an indication that they were placed in evidence.

All the foregoing exhibits were annexed to the answer to the Petition for Writ of Mandamus filed in the Seventh Circuit by Judge Holder, and they are set forth in their full text at the end of this brief.

THE COURT: *Are you referring to this publicity statement from that meeting? There's quotes in there from him.*

MR. MILLER: Yes. This publicity–I am not sure where this came from, Your Honor.

THE COURT: Well, the press handed the Court a copy of it. That's a Xerox copy of it." (Tr. 147)

The foregoing *concluded* the government's evidence (Tr. 150) until the judge offered additional material, beyond Exhibit B already referred to, to government counsel:

3. The court handed government counsel a copy of a newscast from WTWO, a Terre Haute television station, which attributed certain statements to Mr. Kunstler. Government counsel promptly offered it in evidence (*id.* at 151) and it was identified[15] over objection (*id.* at 160). This exhibit is reproduced at the end of this brief, with the other three exhibits. The newscast contains no formal quotation or statement from Mr. Kunstler. It refers to the fact that Mr. Kunstler had spoken to a Black division of a student organization on behalf of his client, Mr. Banks. It does not indicate that Mr. Kunstler in any way discussed the charges against Respondent or any of the items referred to in Rule 27. The newscaster reported that Mr. Kunstler had expressed the opinion that the only successful way to defend oneself against charges such as those facing Mr. Banks was to create a support group around the trial, including demonstrations, making sure that every court session has a full house. The commentator also said that Mr. Kunstler had a comment concerning draft evaders and the granting of amnesty, but did not say what that comment was.

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[15] See footnote 14, *supra*, p. 22.

4. Lastly, the government, again over objection, marked for identification[16] as Exhibit D (*id.* at 163) an article from the February 26, 1973, issue of *Time* because Mr. Kunstler is quoted there as saying: "The moment he [Banks] went into prison he was doomed." In no other way is Mr. Kunstler quoted there, nor does he mention the indictment at all. There is no evidence as to when and to whom Mr. Kunstler made the quoted statement and whether he authorized its use by *Time*. This exhibit is also appended to this brief.

Neither the government nor Judge Holder mentioned that the same article in *Time* includes the following paragraph quoting the Director of the Federal Bureau of Prisons:

> "Federal officials express surprise at the attention Burghardt's case is receiving. He was 'identified as a ringleader,' says Norman Carlson, director of the Federal Bureau of Prison, 'and when the officers attempted to place him in segregation, he attempted to agitate other inmates in his behalf.' "

5. Next the court mentioned a memorandum from the judge's secretary indicating that she had received inquiries concerning when the *Banks* case was to be tried (*id.* at 166). Petitioner asked Mr. Kunstler whether he would stipulate the facts as to what appeared in the memorandum. Mr. Kunstler refused (*id.* at 166) and the secretary was never called as a witness.

The court then, calling attention to the fact that the news broadcast (Exhibit C for identification) had included in the statement, "And Kunstler had a comment concerning draft evaders and granting amnesty" (Tr. 170), pressed Mr. Kunstler, as follows:

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[16]See footnote 14, *supra*, p. 22.

"THE COURT: What did you say to the public via these radio and television newscasts pertaining to what is referred to, here, by this commentator: 'And Kunstler had a comment concerning draft evaders and granting of amnesty.' What do you say about that?"

Mr. Kunstler, while objecting to the inquiry, did his best to respond to the question as follows:

"MR. KUNSTLER: Well, Your Honor, I am going to answer that question, but I really don't think it's pertinent or justified in this inquiry.

I don't know exactly if I was asked a question about draft evaders and the granting of amnesty. What I would–did say–I'll tell you my feelings, and probably–

THE COURT: Would you include in that what you said about prisoners of war about that time?

MR. KUNSTLER: I don't remember that I said anything about prisoners of war.

It says here: 'Kunstler had a comment concerning the draft evaders and the granting of amnesty' and–

THE COURT: That was this commentator. I am talking about the rest of them in this area. What did you communicate to them about prisoners of war and–

MR. KUNSTLER: I really don't remember. I tell you what my general feelings are, if your Honor wants.

THE COURT: No, I want to know what you told them, to the–

MR. KUNSTLER: I can't remember.

I am in favor of amnesty, so I probably said that.

I also probably said that I think that people who avoided the draft on the grounds Mr. Banks did–

that this was an immoral, illegal, and unjustified war; that it was sheer murder—were I thought, true heroes of America; and that was what we wanted the German soldiers to do when Hitler ordered them to commit acts of aggression.

And I probably said something like that. I don't remember whether I said anything about prisoners of war, whom I think are also victims of that war, every bit as much as Arthur Banks is a victim of the war.

I have the same essential feelings about POW's as I have about Arthur Banks. He is also a POW, as they were, held by a different Government: He for refusing to do what everyone now agrees was wrong, and they for being forced to do what everyone now agrees was wrong. So I feel a common bond between them. So I thought if—and I thought that if I said anything about POW's, I thought their release should certainly militate his release as well."

Thereafter the court, in the presence of the defendant—and of course the press since this was in open court—engaged in the following colloquy with Mr. Kunstler and Mr. Banks:

"THE COURT: What effect do you [Mr. Kunstler] think that will have on the jury, and the public generally, of your feelings about that in defending an assault and battery case of your client?

MR. KUNSTLER: I have no idea.

THE COURT: Now, do you think you should visit those opinions, and those causes that you promote—right or wrong—and have your client carry that on his back in an assault and battery case?

MR. KUNSTLER: Well, he's carrying nothing on his back. Some people might agree wholeheartedly with what I say. Other people might oppose it. My political views are well known throughout the United States.

I might indicate that, since Chicago, all the cases that I have tried, I have been successful with one exception: A murder case in which a defendant had a confession which went into the record.

Jurors in the South, Norfolk Virginia, New York, Midwest.

I trust jurors; more, maybe, than the Court does. I, very well understand, that the lawyers–

THE COURT: I am always looking–let me repeat my example–I am always looking down the road, after trial: What is the defendant going to say then?

MR. KUNSTLER He is here–

THE COURT: What is he going to say then, if he is convicted, and he feels that, 'My lawyer, I carried his marbles into this game'?

MR. KUNSTLER: He is here, Your Honor; he can speak, himself.

I would ask Your Honor to permit the defendant to say what he thinks on that.

THE COURT: All right, go ahead. Yes, sir?

DEFENDANT BANKS: Your Honor, I feel impelled to say something here at this point: I have no illusions whatsoever about my standing in this community, or in any white community in this country. I am Black; that's partially enough to get me behind the eight ball, as far as that is concerned. I am a convict, Your Honor; I am deemed a criminal by this society, and I am incarcerated in a penitentiary. That is another thing that I have to my detriment.

I have no illusions about what a jury may–

THE COURT: Counsel, would you ask your witness questions on the point that we were–

MR. KUNSTLER: I thought Your Honor wanted the statement, but–

THE COURT: You asked to produce your your client here as a witness on the point of: Would he forgive you for your carrying *a monkey on your back*, here, about the other causes we are talking about. [Emphasis supplied.]

DEFENDANT BANKS: I have carried many monkeys on my back, Your Honor; I forgive him his.

THE COURT: That was the point of your calling him. Now call him and ask him questions about your causes that you carry, that may be visited upon your client. You understand what I am talking about.

MR. KUNSTLER: May I put him on the stand, then?

THE COURT: All right, sir.

MR. KUNSTLER: He's still sworn, Your Honor, from his previous testimony.

ARTHUR NAPIER BURGHARDT, charged in the Indictment as ARTHUR CHESTER BANKS, III, called as a witness by the applicant, having been previously sworn to tell the truth, testified further as follows:

DIRECT EXAMINATION CONTINUING. QUESTIONS BY MR. KUNSTLER:

Q Mr. Banks, you have heard the Judge refer to the causes which I espouse or support, and he's used the term, 'a monkey on your back,' and so on. I would just like to ask you if, after knowing of my political and ethical and moral convictions, and knowing that they have been publicized here and in many other places in the United States, would that in any way make you want to change your mind about retaining me as your attorney?

A No, sir. Your beliefs are your own.

MR. KUNSTLER: I would hope, Your Honor, that jurors would understand that as well, my beliefs are my own. Thank you, Mr. Banks.

(WITNESS EXCUSED)." (Tr. 170-76)

The foregoing is the entire record of evidence in the April 1 hearing.

At page 179 of the transcript the court began a statement which, with minor interruptions, continued until page 216 and included a detailed statement of the dates and problems of resolving pretrial matters. At page 216, the court started quoting Rule 27 with respect to publicity by counsel, and there then (at Tr. 222) occurred another extended colloquy, this time between the court and Mr. Allison (Mr. Barnhart's partner), in which Mr. Kunstler and finally Mr. Banks, joined:

"THE COURT: Did you see any communication in the press that this case was being funded in part by the Angela Davis Fund, defense fund?

MR. ALLISON: In the Indianapolis press, Your Honor, or any press?

THE COURT: Yes, sir, any press, sir.

MR. ALLISON: Judge, I read a lot of material; I don't know what I read on this case in the Indianapolis newspapers. Do I specifically remember having read something about–

THE COURT: Would it refresh your recollection if I showed you one?

MR. ALLISON: Surely it would, Your Honor.

THE COURT: Let's see if we can find it. Here's a clipping from the Indianapolis News, Indianapolis, Indiana, February 21, 1973. Would you peruse that and see if that will remind you concerning Angela Davis funds supporting this case in part?

MR. ALLISON: It says, 'Government officials have a different version of the circumstances'–

THE COURT: Does that refresh your recollection, Mr. Allison?

MR. ALLISON: Yes, it does.

THE COURT: All right. What does it refresh your recollection about the Angela Davis Fund, sir?

MR. ALLISON: I remember reading this article, Your Honor, back in February some time. Let me see. That's it, Judge: Yes, I did.

THE COURT: And is it a fact, to your knowledge, that the Angela Davis Defense Fund is supporting this case?

MR. ALLISON: No, Judge, I wouldn't even know.

MR. KUNSTLER: Your Honor, I am going to object here. They are not, but I think in asking that question you are going beyond the bounds of propriety in the courtroom. They are not supporting this case that I know of, but you are asking a question that really is none of the Court's business whatsoever, who supports this case. If it was supported by–

And I bet you have never asked anybody in this courtroom before, who supported a case, anybody representing a private client in this courtroom. I don't think it's your business to go into that, Your Honor, with all due respect.

They are not supporting it; I will answer your question directly, because I think what you are trying to do is give a coloration of Communist support, or what you–

THE COURT: Wait a minute, I have not said–

MR. KUNSTLER: You brought the–

THE COURT: One at a time, please.

MR. KUNSTLER: You brought the clipping in here, and you are asking this young attorney whether he read it. He read it, he said; he said he

read it. Now you are asking him whether the Angela Davis Committee is supporting this case, and there can be only one intention behind that, Your Honor, with all due respect, and that is to prejudice this defendant.

MR. ALLISON: Your Honor, I already told you: I am not associated with this case.

MR. KUNSTLER: Your Honor, I am asking this young attorney not to answer any questions, as this man's attorney, because I think it's a deliberate prejudice of this man.

THE COURT: Which man's attorney are you?

MR. ALLISON: I am–

DEFENDANT BANKS: He is my attorney, Your Honor.

THE REPORTER: One at a time, please.

THE COURT: You are not attorney for this man here?

MR. KUNSTLER: No, Your Honor, but he is–

THE COURT: The connotation you just placed on this 'young attorney' the record should disclose that he is an experienced trial attorney, and has served four years in the State Legislature as a State Senate [sic], and he's no–

MR. KUNSTLER: He's a young attorney as far as my fifty-three years are concerned.

THE COURT: –no babe in the woods.

MR. KUNSTLER: But Your Honor, I just don't want my client's rights prejudiced by this sort of colloquy between you and Mr. Allison.

THE COURT: This reached the people, the subscribers of this paper in the Southern District of Indiana; and this is [sic] paper is what said it; I didn't say it.

MR. KUNSTLER: What's that to do with my qualifications? That is what I don't understand at all.

MR. ALLISON: Judge, it doesn t say anything in here that he said anything about this.

THE COURT: Well now, gentlemen, any time a man takes the witness stand and testifies, his credibility is at stake, Mr. Kunstler.

MR. KUNSTLER: Put me on the stand then, Your Honor.

THE COURT: Mr. Kunstler said he was hired by this man, Banks. Mr. Banks had told me that he had received—early in the stages, that his family had engaged Mr. Kunstler. Here's a public statement that refutes both of them.

DEFENDANT BANKS: Your Honor, I said before you that people in New York City—you know, one person particularly had spoken to Mr. Kunstler, and Mr. Kunstler had alerted me through this person that he would be definitely my attorney. That is exactly what I said, Your Honor.

And as far as the Angela Davis Committee giving any support whatsoever, I know of no monetary support; I don't believe there is any.

I am an actor, and I am a well-known actor, Your Honor, and what people say about me is of little consequence to me; a lot of things have been said before. And I give no credence to what a lot of newspaper articles have said about me in the past." (Tr. 222-27)

Following this, Mr. Kunstler made a motion to disqualify Judge Holder, and pointed out that the judge's comments, for which there was absolutely no foundation, would have the effect of giving a Communist coloration to the case and would gravely prejudice Mr. Banks. Mr. Kunstler's comments follow:

"So, Your Honor, I would like to move to disqualify you at this point from further consideration of this matter. I think this record is clear, that you are

prejudiced against this defendant—put aside his attorney—and you are using the power of your office to make a record here to indicate to the general public that he cannot get a fair trial; and you are, in effect, making it impossible for him to get a fair trial.

"If you blame me for my public remarks, what more public remarks could there be to hurt a defendant than to tell the people in Terre Haute, Indiana, he is supported by Angela Davis? Angela Davis might feel sympathetic to this case. I don't know what her feeling is about this case.

"But Your Honor knows, when the newspapers tomorrow print this, that there will be many people in Terre Haute who are going to say: 'Yes, supported by a Communist.' And you are going to have real problems now with jury selection.

"I think you have made it impossible to get a fair jury in Terre Haute by remarks such as that." (Tr. 229-30)

The court thereupon denied the application of Mr. Kunstler for leave to appear (*id.* at 246) and Mr. Banks stated, "Your Honor, I stand mute henceforth. I can't take this any more." (*Id.* at 249.)

Though the court had scheduled hearings on other pretrial matters and lengthy memoranda had been submitted dealing with discovery matters, it adjourned at the conclusion of the hearing.

It should thus be observed that the *whole* of the evidence upon which Judge Holder based his claim of a "pattern of pretrial publicity . . . by petitioning attorney" consisted of:

1) An interview sought by a lone newspaper reporter at a cocktail party of a group of lawyers, the report of the interview appearing at page 31 of a newspaper in a community 95 miles from the location of the trial and outside the area from which the jury would be drawn;

2) A talk to a group of high school students within the community with a statement that a case of this sort needed support around the trial, including demonstrations, with no suggestion that they should not be peaceful. The talk also included an invitation that the listeners come to court and make sure every court session is full. This talk produced a less than one-minute newscast by a television reporter, Mr. Kunstler not appearing thereon, which included references to opinions of Mr. Kunstler;

3) A press release by the committee supporting Mr. Banks, with no proof that it was distributed in the community or resulted in any publicity;

4) A one-sentence quotation in *Time* magazine, with no indication of when the statement was made or whether the quotation was authorized.

And although Judge Holder at one point said to Mr. Kunstler, "What did you say to the public via these radio and television broadcasts?", there was no proof of any radio or television broadcast by Mr. Kunstler; the television newscast was not by Mr. Kunstler, and in any event the statements repeated by the newscaster (if Mr. Kunstler was accurately quoted) were plainly not violative of Rule 27.

Events following April 1 and prior to the intervention of the Seventh Circuit.

By written order dated April 2, Judge Holder confirmed his order stated from the bench and included the following justification for his action:

> "When petitioning attorney's conduct in the subject cause is reviewed in its entirety, the impact this must have upon potential jurors in Terre Haute Division of the Court inevitably inures to the detriment of the *defendant* in the subject cause." (Emphasis supplied; Petition for Certification, p. 51.)

By further order dated the same day, Judge Holder designated one Bueno Chaney, a practicing attorney in Terre Haute who had previously been appointed to represent some inmates in the correctional institution (Tr. 268), as counsel for Mr. Banks. The latter refused to be represented by Mr. Chaney and the court at a hearing held on April 3 recognized that fact and made clear that the case would nevertheless go to trial, stating, "This lawyer is going to be prepared for trial on the 21st even though your client won't accept him" (*id.* at 271). At that hearing, which was called to protest Respondent's impending removal to Sandstone, Mr. Chaney made no appearance. Mr. Allison, partner of Mr. Barnhart, represented Respondent, and the court took occasion to note that its action in appointing Mr. Chaney, who was a former chairman of the Republican Party in Indiana, had been reported in the press, with some apparent suggestion that the appointment had political overtones. The court denied any such intention, saying,

> "I was perfectly willing to accept him because I enjoy and agree with his proclivities and operations in the past and proud to appoint him, but I just wanted to clarify that this is not a political case as far as the court is concerned." (*Id.* at 268.)

And the court went on to say:

> ". . . there just can't be any political significance to the appointment of the man that the Court has appointed to handle this case, despite the inferences that some have attempted to draw from it from newspaper articles, which has been very unfortunate–very unfortunate for the litigants involved in this case." (*Id.* at 269.)

Thus, Mr. Kunstler's prediction that Petitioner's actions from the bench would receive wide publicity in local newspapers (*id.* at 229) was borne out. Petitioner's own conclusion that the publicity emanating from his

actions was "unfortunate for the litigants involved in this case" was certainly true and Petitioner by his own actions in court gave this case far more publicity than anything that Mr. Kunstler had ever done.

The proceedings before the Circuit Court.

Under date of April 11, 1973, Mr. Banks filed his Petition for a Writ of Mandamus before the Seventh Circuit. A copy of that Petition appears with the papers lodged with the court, beginning at p. 275.

In his answer to the Petition for Writ of Mandamus, Judge Holder, consistent with the position he had articulated at the hearing, stated his perception of the issues, as follows:

> "[O]n the basis of this record, Judge Holder did not abuse his discretion by denying the application of Attorney Kunstler but, rather, took the only action possible under his oath of office as a judge; that is, to act in a manner under the law which would provide and guarantee the *defendant* in his criminal case with a fair trial." (Answer to Petition for Mandamus, p. 51; underscoring supplied.)

The Circuit Court rendered its decision on May 17, 1973. In its opinion the court indicated that it viewed the case as presenting important issues concerning "the extent of a defendant's right to representation by counsel of his own choosing." The Circuit Court pointed out that the district court stated that it was acting out of "deep concern for protecting the right of a defendant to a fair and impartial jury" and that since Mr. Banks had stated unequivocally that he wished Mr. Kunstler as his attorney, that was dispositive. (See opinion of Court of Appeals, p. 42, Petition for Writ of Certiorari.)

On a petition for rehearing, Judge Holder pursued an issue not theretofore asserted, namely, the balancing of "the interest of the prosecution in obtaining a fair trial

and the inherent right of the court to protect the public's interest in the orderly and fair administration of justice, on the one hand, against the defendant's Sixth Amendment right to counsel of his own choosing." The Circuit Court, after pointing out that Judge Holder had not previously presented the "broader issue," nevertheless considered it and concluded:

> "... before a trial court may properly limit the defendant's right to a chosen counsel, there must be sufficiently supported and specific findings of fact that the conduct of the defendant's attorney creates a serious and imminent threat of 'significant prejudice to the defendant himself' or of 'disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' *Magee v. Supreme Court of City and County of San Francisco*, 8 Cal. 3d 949, 506 P.2d 1023 (1973). See *Chase v. Robson*, 435 F.2d 1059 (7th Cir., 1970).
>
> "Because interference with the individual's choice of counsel should be kept to the necessary minimum, in each case the trial court must consider carefully whether a less drastic alternative, such as a narrow injunction limiting particular kinds of public statements, would suffice to protect the other interests at stake. Of course, to the extent that the defendant knowingly and intelligently endorses the conduct of his attorney in making speeches and press releases, he waives his right to claim that he has been denied his sixth amendment right to a fair and impartial trial.
>
> "The findings of respondent [Judge Holder] in this case clearly did not meet this standard. Our independent review of the record reveals that the hearing did not include this broader issue within its focus, and that the evidence with respect to the statements which could be deemed improper would not support such a conclusion." (Petition for Writ of Certiorari, pp. 46-47.)

Events since the Court of Appeals decision.

The trial of respondent has not occurred because a petition for a writ of certiorari was filed with this Court and a stay of the order of the Court of Appeals was granted by Mr. Justice Rhenquist on October 5, 1973.

Thereafter, as noted in the Peitioner's brief (p. 11), habeas corpus proceedings were brought which the district court, per the Honorable S. Hugh Dillin, another United States District Judge for the Southern District of Indiana, refused to acknowledge because Mr. Kunstler's name appeared on the papers (Petition for Writ of Certiorari, p. 52).

Following that, as appears from Respondent's motion heretofore filed, after Mr. Banks was moved to Sandstone, Minnesota, a habeas corpus proceeding was filed in Respondent's behalf by Mr. Kunstler in the United States District Court in Minnesota and Mr. Banks was released on bail therein. Though that proceeding has been pending since February 15, 1974, and Respondent has sought an evidentiary hearing, the government has yet to file an answer there and the court has not set the matter for a hearing. Instead, the government has filed a mandamus proceeding before the Eighth Circuit seeking reversal of the release on bail. As of the date of submission of this brief, the Circuit Court has not acted on the said petition.

Our statement of facts has been extensive but we believe it was required in order to give the Court a full and objective view of the case and to overcome a factual presentation which appears to have been wanting in "fairness and candor." See, *New York Central R.R. Co. v. Johnson*, 279 U.S. 310, 319 (1929).

SUMMARY OF ARGUMENT

The right to counsel means counsel of one's choice. In the federal judicial system, admission of an out-of-district lawyer who is a member in good standing of the bar of

his home state is a matter of Constitutional right. This flows from both the Sixth Amendment right to counsel and the nature of the national judicial system. And if there be any circumstances under which *pro hac vice* admission may be denied, the court would be required to act in a non-arbitrary fashion.

On the facts of this case, the refusal of the lower court to permit Respondent to have out-of-district counsel of his choice was violative of his Constitutional rights and, in addition, arbitrary. The asserted grounds for such refusal–possibility of delay in the trial and an alleged violation of rules of the court respecting pretrial publicity–were unfounded.

The lower court in fact refused to permit Respondent to have his choice of counsel because of the judge's disagreement with counsel's dissident views, a wholly impermissible basis for denying a *pro hac vice* admission.

A federal district court judge may not, in lieu of proceedings against counsel on an allegation that he engaged in conduct meriting discipline, deprive Respondent of counsel of his choice, particularly when it appears that on the facts, discipline could not be sustained against the attorney.

Court Rule 27, proscribing extrajudicial expressions of counsel, is violative of the First and Fifth Amendments because–

a) It is a blanket proscription of counsel's speech in *all* cases with no finding that such proscription was required in a particular case, an essential condition to such a regulation in the light of this Court's holdings with respect to avoidance of over-breadth, the requirements of precision of regulation in the First Amendment area, and the requirement of individualized determination where sensitive rights are affected.

b) Aside from the blanket nature of the determination, the proscriptions of Rule 27 are overbroad.

c) Rule 27 proceeds upon an impermissible standard for speech limitation, namely, a "reasonable likelihood" of interference with, rather than a "clear and present danger" to, the administration of justice.

d) Rule 27 throttles counsel for the defense but imposes no adequate limitations on the speech of law enforcement officers.

The invitation by counsel to Respondent to members of the public to come to the trial was well within Respondent's right to a public trial.

Respondent has been denied a speedy trial.

ARGUMENT

I.

A UNITED STATES DISTRICT COURT JUDGE DOES NOT HAVE THE POWER, UNDER RULES RELATING TO *PRO HAC VICE* ADMISSIONS, TO DENY SUCH ADMISSION TO AN OTHERWISE QUALIFIED ATTORNEY IN GOOD STANDING AT THE FEDERAL BAR OF HIS HOME STATE, AND, IN ANY EVENT, MAY NOT EMPLOY HIS POWER WITH RESPECT TO SUCH ADMISSION TO DENY A DEFENDANT IN A CRIMINAL CASE THE RIGHT TO HAVE COUNSEL OF HIS CHOICE.

Our submission here is that Respondent was entitled to counsel of his choice under the Sixth Amendment, and a denial to him of the opportunity to be defended at the trial by such counsel in a federal court violated a fundamental Constitutional right.

We further submit that as to federal courts, admissions of extra-district attorneys *pro hac vice* is a matter of a *defendant's* Constitutional right to select counsel of his choice, provided the attorney is in good standing at the federal bar of his home state. Additionally, we submit that even if a court is permitted in unusual circumstances to exclude an out-of-district attorney, it by no means has

uncontrolled discretion, but is required to act in a non-arbitrary fashion in the same manner as it would be required to act with respect to an in-district attorney.

The Sixth Amendment right to counsel is one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Powell v. Alabama*, 287 U.S. 45, 67 (1932); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *White v. Maryland*, 373 U.S. 59 (1963); *United States v. Wade*, 388 U.S. 218 (1967); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); and see the most recent explication by this Court of the history of the right to counsel in Anglo-American law, *United States v. Ash*, 413 U.S. 300 (1973).

And the right to counsel means counsel of one's choice. That was the teaching in the landmark case of *Powell, supra:* "it is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice," 287 U.S. at 53; *accord, Glasser v. United States*, 315 U.S. 60, 70 (1942). And again, "[A] defendant in a state criminal trial has an unqualified right, under the Due Process Clause, to be heard through his own counsel," *In re Groban*, 352 U.S. 330, 332 (1957). In *Chandler v. Fretag*, 348 U.S. 3, 9 (1954), the Court stated firmly that a defendant's right "to be heard through his own counsel was unqualified;" and see also *Reynolds v. Cochran*, 365 U.S. 525, 530-31 (1961); *United States v. Bergamo*, 154 F.2d 31, 35 (3d Cir., 1946; *Reickhauer v. Cummingham*, 299 F.2d 170, 172 (4th Cir., 1962), cert. den., 371 U.S. 866 (1962; *Heard v. Gomez*, 321 F.2d 88 (5th Cir., 1963); *Holly v. Smyth*, 280 F.2d 536, 539-40 (4th Cir., 1960); *Lee v. United States*, 98 U.S. App. D.C. 272, 235 F.2d 219 (D.C. Cir., 1956); *Releford v. United States*, 288 F.2d 298 (9th Cir., 1961); *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir., 1960),

mod. on other grounds, 289 F.2d 928 (5th Cir., 1961); *United States v. McMann*, 386 F.2d 611, 618 (2d Cir., 1967), cert. den., 390 U.S. 958 (1968); *Backer v. C.I.R.*, 275 F.2d 141, 144 (5th Cir., 1960); *United States v. Bradford*, 238 F.2d 395, 397 (2d Cir., 1956), cert. den., 352 U.S. 1002 (1957); *Joseph v. United States*, 321 F.2d 710, 712, n. 1 (9th Cir., 1963), cert. den., 375 U.S. 977 (1964); *United States v. Pigford*, 461 F.2d 648 (4th Cir., 1972); *Lefton v. City of Hattiesburg, Miss.*, 333 F.2d 280 (5th Cir., 1964); *Sanders v. Russell*, 401 F.2d 241 (5th Cir., 1968); *Magee v. Superior Court of the City and County of San Francisco*, 8 Cal.3d 949, 106 Cal.Rptr. 647, 506 P.2d 1023 (Sup.Ct. of Cal., *In banc*, 1973). See also generally, William A. Beaney, *The Right to Counsel in American Courts*, p. 190 (University of Michigan Press, 1955); Cheatham, "The Reach of Federal Action Over the Profession of Law," 18 Stanford L.Rev. 1288, 1293.

In *United States v. Riley*, 332 F.Supp. 831, 835 (D.C. R.I., 1971), the court observed:

> "The essence and meaning of Chandler [*Chandler v. Fretag*, 348 U.S. 3 (1954)] is the right to one's own available counsel. To say this is satisfied by forcing other counsel on an accused would be a sardonic conclusion to a cherished right and it matters not whether the culprit be the state or a third party private individual, the end result is the same."

Recently, the Seventh Circuit in *United States v. Seale*, 461 F.2d 345 1 (1972) condemned the District Court's failure to make sufficient inquiry into the defendant's objections to proceeding to trial without counsel of his choice and to make allowances for the delay occasioned by chosen counsel's illness. In so holding, the court stressed that–

> "If the Sixth Amendment right to the effective assistance of counsel means anything, it certainly means that it is the actual choice of the defendant which deserves consideration." 461 F.2d at 358.

There are a few recognized limitations. A defendant seeking to have court appointed counsel does not have a right to dictate the appointment. *Cf., United States v. White*, 451 F.2d 1225 (6th Cir., 1971); *Reiff v. United States*, 299 F.2d 366 (9th Cir., 1962), cert. den. 372 U.S. 937 (1963); *Kruchten v. Eyman*, 276 F.Supp. 858, 859 (D.C. Ariz., 1967), aff'd. 406 F.2d 304 (9th Cir., 1969), mod. on other grounds, 408 U.S. 934 (1972); *United States v. Davis*, 365 F.2d 251 (6th Cir., 1966). But even here it has become the growing practice of courts to appoint counsel requested by an indigent defendant if counsel is willing.[17]

Also, where the defendant seeks to change his choice of counsel immediately before a trial, or delays choosing counsel until immediately prior to trial, a court will not permit such delays to interfere with the smooth working of its calendar. *United States v. McMann, supra*, at 618-19; *Lee v. United States, supra*, at 221. But even in those situations, the court will be very slow to override defendant's efforts to obtain counsel of his own choice. *United States v. McMann, supra*, at 618-19; *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1214-15 (3d Cir., 1969). Especially is this so in an "unpopular" case having "First Amendment overtones," *United States v. Mitchell*, 354 F.2d 767 (2d Cir., 1966). Normally, only an indication of a bad faith toying with the court's time will result in the court's going ahead with a trial without the defendant's having counsel of his choice. *United States v.*

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[17]On this basis, Mr. Kunstler has frequently defended indigent defendents as a court appointed counsel. See, *Government of the Virgin Islands v. Gereau* (D.C. V.I.); *People v. Baker* (Sup. Ct. N.Y. Co.); *People v. Feliciano* (two cases, Sup. Ct., Bronx Co. and Sup. Ct., N.Y. Co.); *People v. H.Rap Brown* (Sup. Ct., N.Y. Co.); and *United States v. Russell Means* (D.C. S.D.).

McMann, supra, at 618-20; *Releford v. United States, supra,* at 708; *United States ex rel. Carey v. Rundle, supra,* at 1215-16; *United States v. Terry*, 449 F.2d 727, 728 (5th Cir., 1971).

Nor does the fact that counsel of the defendant's choice is required to seek admission *pro hac vice* diminish the power of the defendant to make his own choice of counsel.

In the federal judicial system, admission *pro hac vice* of counsel from another jurisdiction has been stated to be a matter of absolute Constitutional right:

> "To hold that defendants in a criminal trial may not be defended by out-of-the-district counsel selected by them is to vitiate the guarantees of the Sixth Amendment." *United States v. Bergamo,* 154 F.2d 31, 35 (3d Cir., 1946).

Even in civil litigation in federal courts, admission of out-of-district counsel has been stated as a matter of Constitutional right:

> "We are persuaded, however, that where a right has been conferred on citizens by federal law, the constitutional guarantee against its abridgment must be read to include what is necessary and appropriate for its assertion. In an age of increased specialization and high mobility of the bar, this must comprehend the right to bring to the assistance of an attorney admitted in the resident state a lawyer licensed by 'public act' of any other state who is thought best fitted for the task, and to allow him to serve in whatever manner is most effective, subject only to valid rules of court as to practice before them. Cf. Lefton v. City of Hattiesburg, 333 F.2d 280, 285 (5th Cir. 1964). Indeed, in instances where the federal claim or defense is unpopular, advice and assistance by an out-of-state lawyer may be the only

means available for vindication." *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (3d Cir., 1966), cert. den. 385 U.S. 987.

See also, Note, "Constitutional Right to Engage an Out-of-State Attorney," 19 Stanford L.Rev. 856 (1967).

The rule of the *Bergamo* and *Skouras*, cases, of course, follows from the unitary nature of the federal judicial system, which was created for the precise purpose of establishing "national tribunals" to overcome the presumption that otherwise "state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct or control, or be supposed to obstruct or control, the regular administration of justice," *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). It is hardly consistent with the idea of establishing national tribunals, for the purpose of overcoming local interests, to permit different branches of the national tribunals to establish their own local interests. Indeed, the rules of the United States District Court for the Southern District of Indiana provide in a manner similar to such rules in many other districts, for the ready admission of out-of-district attorneys in recognition of the fact that a national judicial system accepts appearances from lawyers throughout the nation.[18]

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[18]Rules I(a) and (b) make clear that membership in the bar of this Court entitled an out-of-district attorney to become a *permanent* member of the bar of the district court if the applicant's "private and professional character is good." Rule 1(c) providing for *pro hac vice* admissions indicates no limitation at all on such admissions of an attorney "admitted to practice in any other United States court." These rules follow:

"RULE 1

(a) The bar of this court shall consist of persons heretofore and hereafter admitted to practice by this court and who have signed the roll of attorneys, who have not been disbarred, suspended or revoked.

(b) Any attorney admitted to practice by the Supreme Court of the United States or the highest court of any state

Some cases recognize the foregoing principle even at the state court level, permitting a denial of *pro hac vice* admission only where such admission would cause "disruption of the orderly process of justice unreasonable under the circumstances of the particular case," *Magee v. Superior Court, supra.* And while occasional references may be found suggesting that intra-state *pro hac vice* admission is a matter of "grace,"[19] *cf., Cooper v. Hutchinson,* 184 F.2d 119, 122 (3d Cir., 1950); *In re Pierce,* 189 Wis. 441, 207 N.W. 966, 970 (Sup. Ct. Wis.,

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may become a member of the bar of this court upon oral motion by a member of the bar of this court if the court is satisfied that the applicant's private and professional character is good from the assurance of the movant or upon report of a committee appointed by the court. Upon being admitted the applicant shall take a prescribed oath or affirmation; pay the required fee; sign the roll of attorneys; give his post office address, and agree to notify the clerk promptly of any change thereof, whereupon his admission will be entered upon the records of this court with certificate to issue accordingly.

(c) No person shall be permitted to practice in this court or before any officer thereof as an attorney, except in his own behalf when a party, unless he has been admitted to practice in this court; *provided, however,* that an attorney admitted to practice in any other United States court may, on application to this court, be granted leave to appear in a specific action."

[19]In the state courts there is at least some basis for argument that the state has an interest in protecting the economic interests of members of the bar or the views of members of the local bar as to the proper financial relationships between an attorney and client, and for those reasons it could be contended that the power respecting *pro hac vice* admissions gives the state some basis for excluding outsiders. These interests of the state were not, however, considered sufficient to prevent a railroad union from making special arrangements with respect to the representa ion of its members, see *United Mine Workers v. Illinois Bar Association,* 389 U.S. 217 (1967), and in any event, are wholly unrelated to the role of the federal courts.

1926); *Thomas v. Cassidy*, 249 F.2d 91 (4th Cir., 1957), cert. den. 355 U.S. 958 (1958); *People of the State of New York v. Epton*, 248 F.Supp. 276, 277 (S.D.N.Y., 1965), it is clear that such admission may not be arbitrarily denied. See, *Cooper v. Hutchinson, supra*, at 122; *State v. Kavanaugh*, 52 N.J. 7, 243 A.2d 225 (1968), cert. den. *sub. nom. Matzner v. New Jersey*, 393 U.S. 924 (1969); Note, "F. Lee Bailey, Won't You Please Go Home – The *Pro Hac Vice* Blues," Utah L.Rev., 1969, p. 227.

Even the petitioner who argues against a rule of absolute entitlement to *pro hac vice* admission acknowledges that "the exercise of discretion [on an application for *pro hac vice* admission] must be reasonable and not arbitrary [and] a defendant's request to be represented by outside counsel, in association with local counsel, will be granted unless good cause for denial appears," (Petitioner's brief, p. 14).

In recent years, litigation surrounding the civil rights struggle in some of the Southern states produced a number of cases in which appellate courts have made clear that *pro hac vice* powers could not be used to deny rights to litigate with counsel of one's choice. One of the most important of those cases is *Lefton v. City of Hattiesburg*, 333 F.2d 280 (5th Cir., 1964), which involved a criminal prosecution removed to a federal court, in which the trial judge would not admit an out-of-state lawyer – by happenstance, Mr. Kunstler – in association with a number of other lawyers.

In reversing the refusal, the Circuit Court relied on both the Sixth Amendment right to counsel and First Amendment associational rights, putting special emphasis on the criminal nature of the case. It said:

> "In this context where the litigation is not brought for private gain, any regulation of the practice of

law must show 'substantial regulatory interest.' [citing *Button*, 371 U.S. at 444] . . . to justify the potential and actual inhibiting effects of the regulation on the constitutionally protected right to litigate." 333 F.2d at 286.

Earlier, the court had said, referring to court rules concerning admission and practice:

". . . such rules may not be allowed to operate in such a way as to abridge the right of any class of litigants to use the federal courts or to deny the Sixth Amendment right of criminal defendants to counsel of their choice." 333 F.2d at 285-86; emphasis supplied.

Similar considerations were involved in *Sanders v. Russell*, 401 F.2d 241 (1968), where the Fifth Circuit set aside a series of local court rules relating to *pro hac vice* appearances which were plainly designed to obstruct out-of-state counsel. Essentially, the same issues, though they came up in the context of the criminal prosecution of an out-of-state lawyer for representing local clients, were presented in *Sobol v. Perez*, 289 F.Supp. 392 (E.D. La., 1968).

And that same period produced three related cases in this Court, namely, *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), *Brotherhood of R.R. Trainmen ex rel. Virginia State Bar*, 377 U.S. 1 (1964); and *United Mine Workers v. Illinois Bar Association*, 389 U.S. 217 (1967). Those cases, involving civil rights litigation and the legal protection of rights of workers, emphasized that the interest of a state in regulating the practice of law could not be employed to "infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest," *Brotherhood*, *supra*, at 7. Those three cases essentially confirmed that the designated classes of

litigants – Blacks in the South and union members everywhere – were Constitutionally entitled to make their own arrangements to be represented by sympathetic lawyers of their choice and that the state could not, under its conceded power to regulate the practice of law, interfere with such arrangements and force litigants to be represented by attorneys who had manifested lack of sympathy with them. See, M. Frankel, "The Alabama Lawyer, 1954-1964," 64 Col. L.Rev. 1243 (1964); J. Oppenheim, "The Abdication of the Southern Bar," in L. Friedman, ed., *Southern Justice*, pp. 127-35 (1965).

The Court in *Lefton, supra,* pointed out that the principles of *Button* and *Brotherhood* applied with even greater force where (a) a federal rather than a state court was seeking to exercise *pro hac vice* rules and (b) "since this is a criminal case, the Constitutional right of the accused to the assistance of counsel of his own choice reinforce this principle," 333 F.2d at 286.

And we might add, as Judge Medina pointed out in *United States v. Mitchell,* 354 F.2d 767 (2d Cir., 1966), the selection of counsel of one's choice has special meaning when the case is an "unpopular cause."

Respondent here is a Black man, a prisoner, jailed for refusing induction in the armed forces, charged with assaulting a guard. A more unpopular cause in Terre Haute, the community where the maximum security penitentiary is located, is hard to imagine. Above all, he should be entitled to counsel whom he trusts and whom he thinks combines empathy with the defense and the special skills which he believes his case requires. That Respondent's judgment of Mr. Kunstler's devotion and skill may be correct is borne out by the fact that it was Mr. Kunstler who managed to gain his freedom by the habeas corpus proceeding in Minnesota. It is hard to believe that locally assigned counsel would even have

considered the move which Mr. Kunstler so effectively employed on behalf of his client.

We observed at the very opening of this brief that Judge Holder was being represented in this Court by private counsel and that the Solicitor General did not join in the petition. One of the reasons may be that the government has traditionally resisted efforts in both federal and state courts to limit participation of out-of-state lawyers where federal issues might be involved. Indeed, in both *Sanders v. Russell,* and *Sobol v. Perez, supra,* the federal government filed briefs opposing the restrictions. The government's brief *amicus* in the Court of Appeals for the Fifth Circuit in *Sanders v. Russell* is particularly instructive in its definition of the government's interest and in its conception of "the federal district court as a single system of national forum.":

> "Unlike the petitioners who are in this case concerned only with this Rule's threat to full vindication of civil rights, the Department of Justice – because of its special position and responsibility – views the Rule in a broader context. We recognize that civil rights litigation is only one type of federal claim litigation, and that the Rule as to Nonresident Attorneys would be applicable to all types of federal claim litigation. Accordingly, one interest of the United States challenged by the Rule is the federal government's interest in insuring that the rights arising under federal laws, including those providing for equal civil rights, are not in any way diluted. We also recognize that the Rule governs the access to the federal courts. Accordingly, a second interest of the United States is to insure free and open access to its Courts in federal claim litigation and that interest is not limited to civil rights cases or to any particular state or region of the country. We judge this Rule in terms of the central government's conception of the

role of the federal court system in federal claim litigation. We conclude that the Rule is objectionable both because of its restriction of the right to access to the federal courts and also because of its threat to the full vindication of all federal claims.

* * *

"We start from the premise that in federal claim litigation the federal district courts throughout the United States should be viewed as a single system of national forums. . . . The goal is to have cases decided on the basis of nationwide rules of law, both substantive and procedural." Government's brief, *Sanders v. Russell*, pp. 5-7.

The foregoing, of course, referred to "federal claim" litigation and the government acknowledged that a court might have "judicial discretion" to deny admission to an attorney who had been guilty of misconduct, but the main thrust of the government's position is the unitary nature of the federal bar from which it concluded that a "heavy burden of justification is cast upon a federal court which would enforce a rule limiting the opportunity of an attorney to appear before it when that limitation is cast in terms of the particular state bar of which the attorney happens to be a member." (*Id.* at 7)

We will demonstrate that, far from meeting the "heavy burden" which the government recognized would be required to exclude a lawyer merely because he was from another jurisdiction, the facts in this case show that the action of the trial court was wholly arbitrary. And it is the analysis of the facts which will demonstrate how wholly inapposite are the cases which Petitioner cites for the proposition that an attorney may be excluded for misbehavior, *e.g.*, *State v. Kavanaugh*, 52 N.J. 7, 243 A.2d 225 (1968), cert. den., *sub. nom. Matzner v. New Jersey*, 393 U.S. 924 (1968).

II.

THE REASONS ASSIGNED BY THE PETITIONER IN HIS ORDER IN THIS CASE FOR REFUSAL TO PERMIT RESPONDENT TO HAVE COUNSEL OF HIS CHOICE WERE PLAINLY WITHOUT SUPPORT IN THE RECORD.

If the rule as to intra-district *pro hac vice* admissions in the federal court is a matter of absolute right, then it is plain that the Respondent's rights have been denied. If the trial judge was of the view that Mr. Kunstler had behaved improperly, then his course should have been exactly what he would do as to any in-district attorney, namely, permit the Respondent to have his lawyer and take such disciplinary action against the attorney as the situation might justify after due notice to the attorney and an opportunity to be heard. *Cf., In re Ruffalo,* 390 U.S. 544 (1968).

If the rule relating to *pro hac vice* admissions gives the district judge any leeway, and his action is to be tested upon some norm of the reasonableness or non-arbitrariness of its action, then it is equally clear that the district court's action cannot be sustained. That court's action was, by any standard, arbitrary as will readily appear from a comparison of what the court said was the basis for its action, with what the record showed.

A. Petitioner's alleged concern about delay.

In his brief, Petitioner for the first time presses before this Court his alleged concern with "delays in the arraignment and apparent delays in future proceedings attributable to chosen counsel." Though the foregoing appears as one of the sub-questions in the brief (p. 5), it is not mentioned in the Petition for Writ of Certiorari (p. 2) and therefore appears not to be properly before the Court (Rule 401(d)(2)).

Beyond that, however, Petitioner's asserted concern with calendaring problems appears to be questionable. Aside from the fact that the stated concern of the court was *Respondent's* interest in a speedy trial, which Respondent expressly waived so as to remove this issue (*id.* at 111, 117, 118), the Court's statements have absolutely no support in the record.

Petitioner in his order dated April 2 states on this score:

> "The record in the subject cause is replete from the first arraignment in the subject cause on December 20, 1972 with delay occasioned by petitioning attorney's failure to appear as counsel in the subject cause. Petitioning attorney's professional work load and political activity would indicate that further delay in bringing the subject cause to trial can be anticipated due to conflicts with petitioning attorney's schedule."

The record is clear that though Mr. Kunstler was contacted by Mr. Banks' family earlier, he was not finally retained until February 9. When Petitioner states in his brief (p. 18) that on December 14, 1972 [*sic;* the indictment was returned on December 17, the first appearance of Respondent in court was on December 20], "respondent represented to the court that Mr. Kunstler had been retained approximately one month previously," he is interpreting against the Respondent an ambiguous record subsequently clarified, as if no clarification had occurred.[20] It is clear that at that time Respondent was

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[20]The record reads as follows (Tr. 306):

"THE COURT: Who is your lawyer?

DEFENDANT BANKS: At the present, Morris B. Blumberg and William Kunstler.

THE COURT: Where is Mr. Blumberg?

DEFENDANT BANKS: Mr. Blumberg is on vacation, and I believe Mr. Kunstler is on the East Coast. Under

seeking to retain Mr. Kunstler, that he was still in solitary, and his communication with the outside world was highly restricted.

Neither at the attempted arraignment of December 20 nor at such attempt on January 2 did the Petitioner seem greatly concerned about delay. The first time Petitioner indicated concern for delay was on February 2, when an

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advisement from a friend of mine in New York, she tells me that they advised that at the arraignment tonight that I stand on the Fifth Amendment, and it's mandated therein anything I say now would tend to incriminate me.

THE COURT: Well, where is Mr. Kunstler?

DEFENDANT BANKS: I don't know.

THE COURT: When did you engage your counsel?

DEFENDANT BANKS: Roughly a month ago.

THE COURT: Well, sounds like they left you at the ship here.

* * * *

THE COURT: Mr. Clerk, have you heard from Mr. Kunstler, this world traveler?

THE CLERK: No.

DEFENDANT BANKS: Your Honor–

THE COURT: Have you heard from Blumberg, here?

THE CLERK: No, Your Honor.

DEFENDANT BANKS: Your Honor, one more moment, please, Mr. Blumberg is on vacation. He is the chief counsel in this case, you see.

DEFENDANT BANKS: Your Honor, *I have retained Mr. Blumberg, my attorney.*

THE COURT: You paid his fee?

DEFENDANT BANKS: Yes, sir! (emphasis supplied)

Respondent's earlier statement that he engaged counsel "roughly a month ago" was ambiguous because it did not specifically refer to Mr. Kunstler and after all Mr. Blumberg was chief counsel and had been paid a fee. The statement in Petitioner's brief quoted above is not supported by the record, which shows an ambivalent reference to Mr. Kunstler.

arraignment was scheduled and Mr. Barnhart requested a delay until Mr. Kunstler could be present. The district court was not one bit fazed by any problems of delay; it proceeded with the arraignment!

The only other occasion of delay in this case was the fact that Judge Holder had to move from March 29 to April 1 a hearing on the issue of Mr. Kunstler's *pro hac vice* admission.

Most important, there was no basis in the record from which anyone could draw a conclusion that Mr. Kunstler would not be prepared to try the case some time in May, when the court indicated it wished to try the case. Mr. Kunstler's statement on that score is undisputed. He said:

> "I am ready to try this case. I have several others which may have to be jockeyed around; that is true. But every lawyer has those problems. Courts set schedules frequently, as Your Honor knows from your long experience on the bench and your own private practice, and reasonable continuances are sometimes requested and in almost every instance granted, to conform to both court schedules and to the schedules of lawyers." (Tr. 92)

There is nothing–literally nothing–in the record from which any conclusion could be drawn suggesting that at the time Mr. Kunstler would not have been able to try the case in May if the court had determined to try it then and had not interfered with Respondent's being represented by Mr. Kunstler.

And obviously, if the court set the case for trial and counsel, because of conflict with other matters, could not be there, it would have had another remedy: It could have gone ahead with the trial, a remedy employed in any number of cases where just before trial a defendant either seeks to change counsel or for some other reason counsel is not available. For other remedies available to the court

in this eventuality (never reached in the instant record), see *United States v. McMann, supra*, 386 F.2d at 620.

The unsupported possibility that counsel would not be available is no reason for not permitting him to appear if he is available. The court could have warned Mr. Banks as to the possibilities of its proceeding if Mr. Kunstler was not available, in which case Mr. Banks would than have no alternative but to proceed with Mr. Barnhart, who was Mr. Kunstler's co-trial counsel (TR. 115)[21] and then no prejudice could possibly be claimed. *Joseph v. United States*, 321 F.2d 710, 712 (9th Cir., 1963), cert. den., 375 U.S. 977 (1964).

These are essentially the suggestions contained in the A.B.A. standards relating to "The Function of the Trial Judge" (3.5[b]):

"3.5 Attorneys from other jurisdictions.

If an attorney who is not admitted to practice in the jurisdiction of the court petitions for permission to represent a defendant, the trial judge may . . .

(b) grant such permission on condition that

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[21]Mr. Barnhart's statement on January 2 (*supra*, p. 10) indicating a limited role for himself had obviously been changed at the hearing of April 1 and the unequivocal statement of Respondent, as follows:

"Let me declare now that both Mr. Kunstler and Mr. Barnhart are my trial counsel, or co-trial counsel; I understand there is a legal distinction between local counsel and trial counsel, and that has been abolished now. These two men are both my trial counsel; I deem them as such." (Tr. 115)

On April 3, Petitioner acknowledged the Respondent had fully accepted Mr. Barnhart (*id.* at 266).

(i) the petitioning attorney associate with him as co-counsel a local attorney admitted to practice in the jurisdiction,

(ii) the local attorney will assume full responsibility for the defense if the petitioning attorney becomes unable or unwilling to perform his duties, and

(iii) the defendant consents to the foregoing conditions."

United States ex rel. Carey v. Rundle, supra, 409 F.2d 1210 (3d Cir., 1969), cited by the Petitioner, demonstrates yet another technique to assure avoidance of possible delay, namely, the appointment of stand-by counsel.

If Petitioner thought that there was any possibility that Mr. Kunstler might not be available, he could have, consistent with standard 3.5, imposed as a condition that Mr. Banks agree that if Mr. Kunstler were not available, Mr. Barnhart would proceed. He could even have appointed an independent lawyer as stand-by to take over if necessary. But neither of those remedies meant that he would deny Mr. Kunstler *pro hac vice* admission for *fear* of delay; he could have taken supplementary measures to prevent delay if a problem should develop.

In *United States v. Mitchell, supra,* the court dealt with a claim of a lower court judge that the threat of delay justified forcing a defendant to go to trial with court appointed counsel, whom he rejected, after a defendant had discharged his previously retained counsel. In language especially appropriate to this case, Judge Medina said:

"[T]he desire for expedition can furnish no justification for the subversion of the Sixth Amendment right to present an effective defense through counsel.

> "In a case where the criminal act charged and occurred nine months before, and where four months had elapsed since the indictment, it does not lie in the Government's mouth now to urge the need for such speed that the trial could not be delayed the few days necessary for defendant to find counsel."

One final point on the matter of threatened delay. The concern of the Petitioner that Respondent not suffer by possible delay in his trial, and the government's fear lest he be hurt by so much as a 24-hour delay (Tr. 31), seem to have all evaporated when the issue became whether Respondent could have Mr. Kunstler as his lawyer. When the Circuit Court ordered that Respondent have the lawyer of his choice, Petitioner pressed forward and obtained stays in the Court of Appeals and this Court, and apparently seems to have balanced the priorities so that possible delay seemed to be less important than preventing Mr. Banks from being represented by Mr. Kunstler. Indeed, nothing has happened in respect to the trial of the indictment since the Circuit Court's ruling sustaining Respondent's right to have counsel of his choice. The district court to this date has not even resolved questions relating to discovery.

B. The alleged threat that Mr. Kunstler would continue a pattern of publicity.

After setting forth what it conceived to be a "pattern of publicity," Petitioner in his order of April 2 says that it was Mr. Kunstler's insistence that he would continue to engage in that conduct which the court considered "most significant in and of itself" to sustain the denial of his

application. Three times the Petitioner says this[22] and its final conclusion was expressly based not on the prior violation of rules relating to pretrial publicity but on Mr. Kunstler's supposed insistence that he would continue to do so.

We will deal below with the question whether Mr. Kunstler did violate the rules respecting pretrial publicity. At this point we wish simply to point out that there is not a word – literally not a word – in the record wherein it appears that Mr. Kunstler stated he intended to continue any program of pretrial publicity contrary to an order of the court.

When the matter of alleged prior publicity was discussed, Mr. Kunstler in fact stated a view which was directly to the contrary:

> "I have a right to make First Amendment statements . . . unless we have a hearing and Your Honor finds after that hearing, specifically, that there was a serious and imminent threat to the administration of justice. If Your Honor finds that, then we have an issue we can treat in the appellate courts and at least

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[22] "Most significantly, the record discloses that petitioning attorney stated his intention to continue in his course of activity, in form and substance, regarding his aforementioned pretrial publicity." (Petition for Writ of Certiorari, p. 50)

* * *

"Petitioning attorney's statement that he intended both in form and substance to continue his pretrial publicity activities which are violations of the Rules of this Court is sufficient in and of itself to sustain the denial of his application to appear as counsel for the defendant in the subject cause." (*Ibid.*)

* * *

"The Court has denied the petitioning attorney's application for the reasons that petitioning attorney's stated course of future conduct will be in violation of the Rules of the Court. . . . ." (*Id.* at 51)

you have followed the Seventh Circuit's admonition." (Tr. 106)

Thus Mr. Kunstler is calling to the court's attention the procedure prescribed by the Seventh Circuit in *Chase v. Robson*, 435 F.2d 1059 (1970), and is saying to Petitioner that if he makes the finding specified by the Circuit, there will then be at least an appealable issue which the parties can "treat" in the Circuit Court. We fail to understand how that statement – an intention of possible litigation – can be read as a threat of violation of the court order if it makes the prescribed finding.

Earlier in the hearing, Mr. Kunstler had made clear his understanding of the law as enunciated by *Chase v. Robson* that press restraints could not be imposed without a prior finding of the district court judge. His statement is as follows:

"I think that Chase versus Robson is the law in the Seventh Circuit, in which this Court sits, and I intend to be guided by Chase v. Robson in this case. I think that Your Honor is bound by it, as we are bound by it, and that any press restraints in this case must contain a clear specific finding, following a hearing, that there is a 'clear and imminent threat to the administration of justice' before they are Constitutionally valid.

"So my filing or not filing a notice of appearance had nothing to do with it. I would have said the same thing I said – or may say in the future – whether I had filed a notice or had not filed a notice, because I had in mind and will continue to have in mind what the Seventh Circuit has told me is the law in this respect.

* * *

"I respect the Seventh Circuit, and will totally live up to its mandate in Chase versus Robson." (Tr. 88-89)

This is not a statement of an intention to violate an order; it is rather an invitation, if the court found it appropriate, to make an order in accordance with procedure set forth in a controlling case, at which time there was no indication whatever that it would be disobeyed. And Mr. Kunstler's statement of the then controlling law in the Seventh Circuit was clearly accurate.

Petitioner may have believed that he had the power to make Rule 27 applicable to Mr. Kunstler without a *Chase v. Robson* finding. But he never told Mr. Kunstler that that was his view of the law and that he expected Mr. Kunstler to abide thereby, *Chase v. Robson* to the contrary notwithstanding. He applied his view—if that is what it was—to Mr. Kunstler's *past* conduct while Mr. Kunstler was laboring under the misapprehension that Petitioner would recognize that *Chase v. Robson* was the law of the Seventh Circuit.

We repeat that there is nothing in the entire record upon which the court could have based its statement that Mr. Kunstler intended to continue the making of public statements of the type proscribed by Rule 27, in violation of a ruling of the court if the court made an appropriate finding that such statements threatened the trial, or in violation of a ruling by the court that such a finding was not required.

C. The claimed violations of Rule 27

At the outset it should be pointed out that at pages 6 to 9, inclusive, of Petitioner's brief, in sixteen separate paragraphs, Mr. Kunstler is charged with making statements to public audiences or to news media concerning the pending criminal case. This method of presentation by sixteen numbered paragraphs is of course designed to give the impression of an incessant program of pretrial publicity. But the record shows that what was involved was:

(i) An interview of February 9, sought out by a single news reporter in a community 95 miles away at a cocktail reception, which resulted in a news article on page 31 of that community's newspaper. There is no proof that the substance of that interview was in any way, shape, or fashion reported in the press of Terre Haute.

This accounts for items 1 to 10 of the schedule of sixteen items enumerated in the Petitioner's brief. Each of the foregoing separately numbered items is simply an extract from the one single interview with a news reporter in a community different from that from which the jury was to be selected. Any reasonable interpretation of Rule 27 would exclude statements in a community other than that from which the jury is drawn, absent some special circumstances or proof that the statement traveled from one community to the other. There was no such proof here. Moreover, nothing in the interview includes the kind of statement that Rule 27 is, or should be, really driving at: a public ventilating of detailed evidence (some perhaps inadmissible) in advance of a trial.

(ii) A press release issued by a committee which supported Mr. Banks. The issuance of the press release was by a "National Committee to Free Arthur Burghardt Banks," whose office is in New York. There was not an iota of evidence as to the distribution of the press release and specifically whether it went to a single newspaper in Indiana, let alone Terre Haute. There was no proof that any newspaper relied on it; there was no proof of the source of the quotations from Mr. Kunstler or whether he had authorized their publication. Mr. Kunstler told the court:

> "I had nothing to do with its preparation . . . [but] I am sure I agree with most of it." (Tr. 147)

* * *

"I haven't seen it before [but] those quotes reflect my opinion. And I don't remember saying them but undoubtedly I did and I would subscribe to them." (*Id.* at 150)

This statement issued in New York and with no proof of transmission to Indiana, and containing a statement of unknown date, made by Mr. Kunstler under unknown circumstances, all before he saw Mr. Banks and settled the question of his representing him, accounts for four more of the sixteen items mentioned by Petitioner (items 11 to 14). And again, a close reading of this item leaves it questionable whether under any circumstances it could be said to have violated Rule 27.

(iii) A newscast by an announcer over television station WTWO in Terre Haute is the third item in evidence and constitutes item 16 of the Petitioner's grouping of statements. Aside from the fact that there is no proof that the statements attributed to Mr. Kunstler by the newscaster were in fact uttered by him in the language set forth,[23] none of the language constitutes a violation of a single one of the six proscriptions of Rule 27.

We know of no federal rule that prohibits a lawyer from stating that attendance at trial by a support group is desirable. Beyond that, however, Rule 27 relates to the "release of information or opinion *for* dissemination by any means of public communication" (emphasis supplied). Similarly, DR 7-107 requires that circumstances be such that "a reasonable person would expect the statement to be disseminated by means of public communication." There is no proof whatever that Mr.

[23] The newscaster did not testify, nor did anyone testify who heard Mr. Kunstler's comments. Mr. Kunstler said:

"I am not going to say every word here is a quote. I mean, I assume that they are within reasonable shooting distance of the target." (Tr. 159)

Kunstler released information to the television station or that he had any reason to expect that his comments would be picked up by a newscaster from that station. The record is that Mr. Kunstler spoke to a group of mainly high school students under the age of 18 who were attending a "Third World Conference" (Tr. 152) and who had seen "a film which the National Educational Television under a grant to Mr. Banks put together on Frederick Douglass' famous speeches." (*Id.* at 153) Mr. Kunstler said, "But as far as the press is concerned, I did not invite the press to that proceeding, which was not under my control at all." (*Ibid.*)

There is no proof indeed that there was any press there, or that if there was, Mr. Kunstler had any knowledge of their presence.

(iv) Finally, there is the *Time* magazine article, Exhibit D, with the quotation from Mr. Kunstler: "The moment he [Banks] went into prison he was doomed." Obviously the foregoing statement violates no rule and of course there is no proof of when, where, or the manner in which the statement was made by Mr. Kunstler, or whether it was accurate.

Respondent submits that analysis of the actual record demonstrates that by no reasonable interpretation can it be said that Rule 27 was violated. Indeed, the determination by Petitioner that there had been a violation of Rule 27 or that Mr. Kunstler had intended to continue making public statements about the case in violation of Rule 27 is so "lacking [in] any relevant evidence . . . as to violate due process," *Vachon v. New Hampshire*, U.S. , 38 L. ed. 2d 666 (1974); *Douglas v. Buder*, 412 U.S. 430 (1973); *Thompson v. Louisville*, 362 U.S. 199 (1960); *Johnson v. Florida*, 391 U.S. 596 (1968). As this Court said in *In re Sawyer*, 360 U.S. 622, 628 (1959), "Speculation cannot take over where the proofs fail."

The expressed concern of the court for the impact upon the trial of this case of public statements by Mr. Kunstler is particularly difficult to understand because the court showed no concern for its own statements and statements of the prosecutor which the court might have realized could shape the media image in Terre Haute of both Mr. Kunstler and Mr. Banks. Particularly disturbing to the potentiality of prejudice to the defendant was the genesis and treatment of the "Angela Davis" item, which was introduced into the hearing by the Petitioner.

We have referred above, *supra*, p. 35-36 to the statements by the Petitioner made on April 3 with respect to the press coverage of the hearing of April 1, and this Court might well take judicial notice of the fact that the report of the action of the Petitioner on April 1 received front-page notice in the *Terre Haute Star* and *Terre Haute Tribune* on April 2. Though the Angela Davis item referred to by Petitioner (Tr. 222) was from the *Indianapolis News* of February 21, 1973, it was not identified or marked when it was referred to. Accordingly, Mr. Kunstler read the relevant portions of it into the record.[24] It will be observed that the statement respecting Angela Davis emanated from the *prosecutor*. Moreover, even that statement did not suggest that the *Banks* case was being funded in any way by the Angela Davis fund, a thought injected by the Petitioner (*ibid.*).

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[24] "U.S. Attorney Stanley B. Miller, said he has received mail from the Free Angela Davis and Other Political Prisoners Committee and several letters and telegrams from Germany supporting Banks." (Tr. 228)

Respondent has confirmed by reference to the February 21, 1973, issue of the *Indianapolis News* that the reading by Mr. Kunstler was accurate and included all references in the said article to Angela Davis.

The Court may wish to take judicial notice of the natural and to be anticipated consequence of the prosecutor's making this statement to the *Indianapolis* newspaper and then Petitioner's introducing the resulting story into the April 1 hearing, with an unfounded suggestion that the *Banks* case was being funded by the Angela Davis group. As a result of this sequence of events the idea of any connection between the Banks case and Angela Davis was transferred from Indianapolis to the Terre Haute community by the extensive coverage given the April 1 hearing in the Terre Haute newspapers. Mr. Kunstler and Mr. Banks vigorously contested the suggestion of Petitioner (*id.* at 226, 228), that Respondent's case was being funded by the Angela Davis group (*id.* at 226, 228). The correction rarely quite catches up with the misstatement.

D. The claim that Mr. Kunstler made certain statements after April 1, 1973 is irrelevant, unproved, and not before the Court. Beyond that, Petitioner has distorted Mr. Kunstler's alleged statements.

In Petitioner's brief, at pages 8 to 12, there are set forth three alleged statements of Mr. Kunstler made *after* April 1, 1973. At no place in the brief is it stated how such statements, if they were made, are relevant to the validity of Petitioner's order *made prior to the time that the alleged statements were made.* The Court will observe that Petitioner's brief carefully omits any reference to the dates of the alleged speeches, or to the manner in which it is contended that Mr. Kunstler's making of the speeches was proved, their context, the completeness of the excerpts, the size and nature of the audience, the tone of voice, etc.

A few points, however, will show how distorted is the Petitioner's presentation:

(i) The Court is told that the three alleged statements by Mr. Kunstler are relevant because "Mr. Kunstler *kept his promise* to make more public statements concerning *the case*" (Petitioner's brief, p. 8; emphasis supplied). No reference to the record is cited for such a "promise" and there in fact was none; this is the same contention to which we referred above at p. 58-61. Secondly, it is plain from the barest inspection even of the alleged quotations in the brief that Mr. Kunstler was not in any way talking about "the case"—in the sense of the indictment against Mr. Banks—but rather was expressing his views about the power of Judge Holder to exclude him from the trial, and some other views as to the functioning of the judicial system.

(ii) The first two of the alleged "speeches" are excerpts from affidavits submitted by Petitioner to the Circuit Court in answer to the Petition for Writ of Mandamus. The Seventh Circuit obviously did not consider them relevant to its review of what Petitioner did on April 1. The third "speech" is from a wholly different case (a habeas corpus before another judge), and is not part of the record of the mandamus which is on appeal; it occurred after the Seventh Circuit acted, and obviously could not have been considered by the Seventh Circuit.

(iii) However irrelevant and unproved, the erroneous impression sought to be created by the setting forth of these excerpted statements cannot be ignored:

> —The quotation beginning at the bottom of page 8 through page 9 consists of extracts from affidavits of two law students (one an F.B.I. agent, the other a member of the working press) who attended a talk given on April 20, 1973 by Mr. Kunstler at the Indiana University Law School in Indianapolis, entitled, "Defendant's right to counsel of his choice." The statements in the brief are

extracts from *selected* portions of a tape recording that the students claim to have made.

—The statements on page 10 of the brief attributed to Mr. Kunstler are truncated excerpts from an interview given by him to an Indianapolis radio station and transmitted by it on May 6, 1973.

—The statements on page 11 were from an interview given on October 6, 1973.

None of the affiants was put on the witness stand and cross-examined, and accordingly Respondent is in no position to be certain as to the accuracy of what they attribute to Mr. Kunstler; he is certainly in no position to comment on the significance of the portions omitted from the affidavits and simply noted with asterisks. But the brief employs a further excerpting, and what is sought to be communicated by these selected excerpts is that Mr. Kunstler was calling on people to obstruct the impending trial of Mr. Banks. What he actually said can in no way be so interpreted.

Appearing at the law school, he discussed the ramifications of the denial to a defendant of counsel of his choice. *Not a word* was mentioned about the facts of the indictment. He lectured to law students and expounded his ideas precisely in the spirit that this Court so recently recognized:

> "The college classroom with its surrounding evirons is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." *Healy v. James*, 408 U.S. 169, 181 (1972).

He was sharply critical of Judge Holder, which he had every right to be; charged him with violating Mr. Banks' civil rights by denying him counsel of his choice; and even expressed his view that the act was criminal, a point of view that is certainly expressable (*cf.*, *Ex Parte*

Virginia, 100 U.S. 339 [1880]), and within the "prerogatives of American citizenship . . . to criticize public men [even] foolishly and without moderation," *Baumgartner v. United States*, 322 U.S. 665, 674 (1944). Omitted from the excerpt set forth in the brief was his invitation to the students at the law school to assist in research for a "thorough investigation of the jury system in the Terre Haute Division" with respect to the inclusion of Blacks, and to do other legal research.

Nowhere is the distortion of Mr. Kunstler's statements more clear than in the excerpted radio interview, the second item in the brief, where Mr. Kunstler is quoted as calling for physical confrontation and picketing of the court house. The change of meaning is achieved by the familiar process of a generous use of asterisks and omission of intermediate material which indicates that Mr. Kunstler was addressing himself to broad philosophic questions as to the relationship of the citizenry to the judiciary, as distinguished from obstructing this case. We set forth in the footnote below in parallel columns a comparison between the interview as it appears in the affidavit attached to the Petitioner's answer to the Petition for Mandamus (and the affidavit shows on its face that it, too, made a liberal use of asterisks and omissions) and the statement in the brief.[25]

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[25]The following parallel column presentation is not of the entire interview, but of such portion as commences with the quotation in the brief, where Respondent believes a change of meaning is effectuated by the process of excerpting. The asterisks on the right hand side are as they appear in the affidavit filed by Petitioner in the Seventh Circuit. Respondent does not have, and is therefore unable to fill in, the omitted material.

"I don't think anyone should respect the law, not certainly as it's practiced in America.	"I don't think anyone should respect the law, not certainly as it's practiced in America.
	* * *

We refer the Court to its opinion in *In re Sawyer*, *supra*, 360 U.S. at 630, where the Court emphasized the

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"***It [the law] is neither fair nor just, because it's manipulated and utilized. . . . And in its own procedures and practices it's unfair as well; built in, deliberately, I think, into the system. I think the best use is to distrust it, strip it of all its mysticism, to demonstrate, to fill courtrooms, to confront it.***

We would think nothing peculiar at all about picketing Congress or picketing the White House—why not picketing the Court?***

[Asked if we are ignorant of the law, Kunstler replied.]

We're ignorant of the fact, Tom, that it's mythology. We take it as something that is, as you said before, sacred. It has an aura of legitimacy about it. Many people trust it, most people trust it, I rather imagine; there is a certain essential fairness to it. All of this is untrue. It is neither fair nor just, because it's manipulated and utilized. . . . And in its own procedures and practices it's unfair as well; built in, deliberately, I think, into the system. I think the best use is to distrust it, strip it of all its mysticism; to demonstrate, to fill courtrooms, to confront it. And I think that the institution of law should be just as amenable to that process as the Congress and the President and any other of our institutions which we don't have that mystical attitude about. We would think nothing peculiar about picketing Congress or picketing the White House—why not picketing the Court? Why are they different—

importance of the context in which statements by lawyers are made, as being determinative in judging their import.

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because they wear the robes of the minister or because they have the mysticism of quietude and the aura of legitimacy? I think they're just another public institution of control, and that they should, when they go wrong, they should be confronted by the general public.

Q. What about that old cliché that's drummed into us from the time we're kids that we are a society of law and not a society of men?

Well, these are like all the other platitudes of our lives, you know, that we have a peace with honor—another platitude without meaning. And we have equal protection of the laws, and equal justice of the law—it's a mess, it's a complete mess.

I think that the only answer in all of these systems, is confrontation. Physical confrontation.***"

I think that the only answer to all of these systems, is confrontation. Physical confrontation. After you have exhaused every other means. I'm not urging people to just run in and demonstrate against the Court *ipso*

The entire matter of Mr. Kunstler's post-April 1 statements has no place in this case except as an unseemly effort to project bias against Mr. Kunstler. Mr. Kunstler does not stand charged with misconduct on the basis of those statements, and he hardly could be; they have not been proved in any manner or in a context such as would be required by the most elementary requirements of due process, and in any event those statements have nothing to do with Mr. Banks' case. Petitioner, by inclusion of this material, is asking the Court in one fell swoop to brush aside Mr. Kunstler's First Amendment rights to express his views on matters of general interest, his Fifth Amendment rights to be confronted with and have an opportunity to respond to any charges that someone might direct at him, and Mr. Banks' Sixth Amendment rights. Though Petitioner relies heavily on *In re Sawyer, supra,* he ignores the fact that the Court in that case was meticulous about limiting its review to the charges made and flatly refused to expand its consideration to charges that might have been made.

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facto. But after the Court has been given a reasonable opportunity, then I think that it is time for people to rise up and confront the Court and not stand in awe of it and not be afraid of it. People must be willing to go to jail for contempt."

III.

A UNITED STATES DISTRICT JUDGE MAY NOT DENY ADMISSION *PRO HAC VICE* TO AN OTHERWISE QUALIFIED ATTORNEY BECAUSE OF THE JUDGE'S POLITICAL DISAGREEMENT WITH COUNSEL OR HIS STATED BELIEF THAT THE POLITICAL VIEWS OF THE ATTORNEY WOULD ENDANGER THE DEFENDANT'S RIGHT TO A FAIR TRIAL, PARTICULARLY WHERE THE DEFENDANT, BEING FULLY ADVISED THEREOF, INSISTS UPON REPRESENTATION BY SUCH ATTORNEY.

Petitioner left little doubt about how he felt about Mr. Kunstler and his views; and he hardly concealed the fact that the true ground for his action in refusing admission to Mr. Kunstler was disdain for the latter's dissident views about a wide range of political questions. Though a consistent line of cases and the whole history of controversial litigation in this country support the right to practice law even though one holds dissident views, and the right of a defendant to choose his attorney, even one from outside the jurisdiction, Petitioner pressed upon Respondent his view as to what was good for Respondent as to the choice of a lawyer. His final ruling reflects the reactions which he showed from the time of the first mention of Mr. Kunstler's name.

On December 20, 1972, Mr. Banks had only to mention Mr. Kunstler's name as *secondary* counsel and Petitioner quipped a reference to "this world traveler." (Tr. 5) The transcript of the hearing on March 29 is suffused with sarcastic and hostile comments about Mr. Kunstler, whom the judge had never met, although all that had occurred was a request for a postponement of a hearing from a Saturday to the following Monday, from

an attorney who was waiting for the return of a jury verdict after a three-month trial.[26]

At the hearing of April 1, however, the attitude of the judge towards Mr. Kunstler's political views developed with absolute clarity. The court—not the U.S. Attorney—asked Mr. Kunstler what he had said to the public—not about the Banks case—but about "draft evaders and granting of amnesty" and about "prisoners of war" (*supra*, p. 24). Mr. Kunstler, though he objected to the relevance of these questions, tried in as forthright a way as possible to answer them (*supra*, pp. 24-26).

There then followed the colloquy among the judge, Mr. Kunstler, and the Respondent fully quoted above (*supra*, pp. 26-28), which finally ended with Judge Holder's phrase about Mr. Banks' carrying a "monkey" (Mr. Kunstler's views) on his back (*supra*, p. 28).

Petitioner has every right to disagree with Mr. Kunstler, as Mr. Kunstler has every right to his views. But Petitioner had no right to test Mr. Kunstler's admissibility to his court *pro hac vice* by any standard rooted in his political disagreement with Mr. Kunstler. See, *Baird v. Arizona*, 401 U.S. 1 (1971). And while the *Baird*, *Stolar* (401 U.S. 23), and *Law Students Rights Research Council* (401 U.S. 154) cases may have presented refined questions as to the scope of permissible inquiry where one deals with bar applicants, it would not appear that any of the Justices disagree with the ultimate point

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[26] "This is forty-ninth on the list. And furthermore he needed a little rest cure, because he is exhausted from the Rap case" (Tr. 60); "Let me put the English on it, here, the big casino now: Can you tell me why—can you tell me, Mr. Barnhart—I mean, Mr. Allison—Mr. Kunstler didn't enter his appearance long before this date—or make application for it—why couldn't he enter an appearance? Did he want to make these speeches without having any obligations as counsel of record?" (*Id.* at 62-63)

expressed in the opinion of Mr. Justice Stewart in *Law Students, supra*, that applicants for admission to the bar may not be excluded where there is a "showing of an intent to penalize political beliefs," 401 U.S. 154, 163, quoting from *Koenigsberg v. State Bar*, 366 U.S. 36, 54 (1961). And see also, *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Matter of Application of Levy for Admission to Practice in United States District Court, Southern District of Texas*, 348 U.S. 978 (1955). The fundamental rule is:

> "The First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs." *Baird v. Arizona*, 401 U.S. at 6.

And if, as stated by the Court, "the practice of law is not a matter of the State's grace," making irrelevant any discussion of a "right"-"privilege" analysis (*Schware, supra*, 353 U.S. at 239, n. 5), then it would seem all the more clear that admission *pro hac vice*, and particularly in a federal court, cannot be a matter of grace and that exclusion based upon political disagreement is impermissible. As this Court so recently observed, even in a case which did not have the elements of Constitutional entitlement, such as right to counsel:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person

> because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' " *Perry v. Sindeman*, 408 U.S. 593, 597 (1972).

Petitioner, however, gave a novel thrust to the matter of his disagreement with Mr. Kunstler's dissident views. He claimed a right to protect Mr. Banks from carrying a "monkey on his back"–Mr. Kunstler's views–despite Mr. Banks' statement that he knew exactly where Mr. Kunstler stood and wanted him.

Throughout the hearing of April 1, Petitioner, as stated by the Seventh Circuit, had focused upon his stated concern for the interests of the Respondent,[27] and in his answer before the Court of Appeals he postulated that his concern was "to act in a manner under the law which would guarantee the defendant in his criminal case with a fair trial." Absent some proof of incompetence on his part, the Respondent's insistence that he wished to be represented by Mr. Kunstler should have resolved the issue completely. That is the essence of the defendant's having *his* choice of counsel. For a judge to impose, over the objections of a defendant, the judge's beliefs as to the damage that an attorney may do to a defendant–when the defendant knows all the facts about his attorney that the judge does–is on its face arbitrary, unless the judge makes a finding that the defendant is incompetent to make the determination. No such finding was made or purported to be made; no such finding could be supported since there is no factual basis therefor. And

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[27]Tr. 116-17, 126-27, 139, 154-55, 172, 173, 174, 237, 243. The United States Attorney expressed similar concern for the Respondent, Tr. 97-98, 99-100, 101-102, 163, 232.

Petitioner's claiming in *Respondent's* interest to impose upon him the judge's notion of what is good for him is on its face an arbitrary interference with Sixth Amendment rights. No view of the power of the court respecting *pro hac vice* admissions can sustain such action.

Mr. Banks was caught in the toils of the prison discipline system, one of the controversial issues of the day. That he wished to be represented by a person of Mr. Kunstler's courage and dissidence was a matter for Mr. Banks to decide, and no one else. Respondent is not politically naive and understands what it means to pay society's price for dissidence. After all, he was sentenced to jail for five years because of his views on the Vietnam War. And he was entitled to exercise his own judgment that his best chance to make his defense was to have a lawyer who not only has wide experience but is also completely free from the impact of local community pressures. *Cf., Seals v. Wiman*, 304 F.2d 53, 68 (5th Cir., 1962).

This Court, in *N.A.A.C.P. v. Button, supra*, 371 U.S. 415, set aside a state statute which would have had the effect of preventing the reference of members of an unpopular minority to lawyers who were associated with an organization sympathetic to their cause. See also, *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois Bar Association*, 389 U.S. 217 (1968). In each case the bar associations assured the court that there were plenty of lawyers available to represent the litigants. But the court sustained the right of litigants to have lawyers of their choice and to make their own arrangements with them.

And the history of controversial litigation is indeed studded with cases of traveling lawyers, of known dissidence, appearing as counsel, sometimes in hostile communities, to defend clients who chose them precisely because they agreed with their views.

Would Judge Raulston have had the power to "protect" John T. Scopes from appearing before a fundamentalist jury in Dayton, Tenn. with a "monkey on his back," *i.e.*, Clarence Darrow's notorious atheism? Or should Judge (later Mr. Justice) Murphy have "protected" Dr. Sweet from the possible impact of Mr. Darrow's abrasiveness upon a racist Detroit jury?

Would Judge Horton have had the power to "protect" the Scottsboro Nine from appearing before a local jury with a "monkey on their backs," namely, that foreign-born New York Jew, Liebowitz?

Would Judge Ferguson have had the power to "protect" Mr. Plessy from having as a "monkey on his back" the views of Arnold Tourgee, at the time considered a nettlesome "carpetbagger"?

And should Peter Zenger have been "protected" from the prejudice that may have followed from being represented in New York by Andrew Hamilton, that notorious libertarian from Quaker Philadelphia?

The action taken by Petitioner directly after he excluded Mr. Kunstler indicates the full reach of Petitioner's action. Respondent is a Black radical who has spent eighteen months in solitary confinement and is at issue with the inner workings of the prison system, its racial practices and its disciplinary approaches when there are racial conflicts, etc. To attempt to foist upon him as his counsel the former chairman of the Republican Party of Indiana, however good a lawyer he may be, because Petitioner agrees with his "proclivites and operations" (Tr. 268 would make a mockery of the Sixth Amendment right to counsel of one's choice.[28] Counsel of *Petitioner's* choice cannot be substituted for counsel of Respondent's choice.

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[28]One is reminded of the fact that in *Powell v. Alabama* there was also an appointment of counsel. The court there "appointed all members of the bar"! Mr. Justice Sutherland's opinion cut through the sham of such an appointment and pointed out that defendant

choice cannot be substituted for counsel of Respondent's choice.

IV.

A UNITED STATES DISTRICT COURT JUDGE MAY NOT, IN LIEU OF PROCEEDING AGAINST AN ATTORNEY FOR ALLEGED DISCIPLINARY INFRACTIONS, DEPRIVE A DEFENDANT IN A CRIMINAL CASE OF COUNSEL OF HIS CHOICE, PARTICULARLY WHERE IT APPEARS THAT ON THE FACTS DISCIPLINE COULD NOT BE SUSTAINED AGAINST THE ATTORNEY AND THERE IS NO SHOWING THAT DEPRIVATION OF THE DEFENDANT'S RIGHT TO COUNSEL IS NECESSARY TO EFFECT A JUSTIFIED CONTROL OF COUNSEL.

We begin with the assumption that there may well be both inherent and expressed powers in the courts and bar associations to discipline and control attorneys.

While Rule 27 adopted by the court does not indicate a method of enforcement, the Reardon Committee Report, upon which the rule is based, makes the following recommendations relating thereto:

"did not have the aid of counsel in any real sense." 287 U.S. 56-57. See also, *Magee v. Superior Court of the City & Co. of San Francisco, supra,* at 1025-26. And another court in recent years once sought to foist counsel upon a defendant who did not wish to be represented by him. The attorney was William Kunstler and the defendant Bobby Seale. *See United States v. Seale,* 461 F.2d 345 (7th Cir., 1972). This Court may be interested in knowing that in the recent retrial of the contempt case before Judge Gignoux he expressly sustained Mr. Kunstler's refusal to represent Mr. Seale because "Mr. Kunstler was not the attorney who was advising Mr. Seale or who was responsible for Mr. Seale's conduct during the first period of the trial while Mr. Seale was still in the trial." *In the Matter of Dellinger*, No. 72-CR-925, U.S. District Court for the Northern District of Illinois, decided December 6, 1973, Tr. 4129.

"It is recommended that violation of the standards set forth in section 1.1 shall be grounds for judicial and bar association reprimand or for suspension from practice and, in more serious cases, for disbarment. It is further recommended that any attorney or bar association be allowed to petition an appropriate court for the institution of disciplinary proceedings, either on the basis of such a petition or on its own motion."

There is a brief commentary on this standard which confirms that Rule 27 would be enforced through discipline against the attorney. The Kaufman Committee, which recommended adoption of the Reardon standard, also made clear that discipline against the lawyer was to be the enforcement technique.[29] Nowhere does the Reardon Committee or the Kaufman Committee suggest that an acceptable or recommended measure for disciplining or controlling an attorney is the denial to a defendant of the counsel of his choice.

We suppose it would be contended that even if the defendant is not the target of the rules he must be prepared to suffer the collateral consequences of justified discipline against his attorney. After all, so the argment would go, a defendant does not have the right to be represented by a disbarred attorney.

Upon this approach then, a client might be expected to suffer loss of his lawyer's services in the unusual situation that his attorney's conduct merited a punishment so severe as disbarment or possibly immediate suspension.

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[29] "Implicit in the Committee's recommendation is the assumption, fully endorsed by the Supreme Court in *Sheppard v. Maxwell, supra,* that the District Court has the inherent power by disciplinary proceedings, and in appropriate cases by contempt to punish attorneys for infractions of its rules and orders." 45 F.R.D. 391.

The correlative of that position would have to be that there is no basis for denying to the defendant the use of his attorney when the alleged infraction of his attorney does not merit a degree of punishment for the lawyer which would prevent him from functioning as such or, for that matter, any punishment. And if the punishment of the attorney is not sustainable, it does not matter that the lawyer is from outside the jurisdiction. The court—at least a federal court which is part of a national judicial system—does not obtain more power to deny a client his choice of counsel because his counsel hails from another part of that national judicial system.

Given the facts as delineated above and the record before the lower court, how can it seriously be contended that Mr. Kunstler could have been subjected to any punishment, let alone disbarment or suspension?

Of course, firstly, he would have been entitled to procedural due process, which in this case he was plainly denied. Prior to the hearing of April 1, Mr. Kunstler was given no "notice of charges" against him; he was not even given a hint of what the U.S. Attorney or the judge were complaining about. *In re Ruffalo, supra.*

But beyond the procedural question there was, as pointed out above, no showing of conduct which could sustain discipline. On the facts of this case we do not believe that by any fair reading of Rule 27 a violation can be made out. The interview with Mr. Bancroft was in a wholly different community and we assume some spatial limitation would have to be read into Rule 27 to avoid its being plainly arbitrary; there was no proof at all as to dissemination of the Committee's press release; the quotation in the *Time* article is not in violation of any of the proscriptions of Rule 27; and the talk to high school students asking them to come to court similarly violated none of the proscriptions of Rule 27, or, for that matter,

any other ethical obligation of a lawyer. See Point VI below.

But let us suppose that a court might disagree and determine by way of example that Rule 27 properly interpreted means that a lawyer may not say the things attributed to Mr. Kunstler even though he speaks in a different locale. We submit that Mr. Kunstler could nevertheless not be punished on that score in a disciplinary proceeding against him because of a failure of proof of an essential ingredient for discipline, *i.e.*, intent. See, *In re Fisher*, 179 F.2d 361 (7th Cir., 1950), cert. den., *Kerner v. Fisher*, 340 U.S. 825 (1950); *In re Ruffalo, supra*, concurring opinion of Justices White and Marshall.

As appears, *supra*, p. 18-19, there can be no dispute that Mr. Kunstler in good faith believed that *Chase v. Robson* means that proscription against public statements could not be applied absent a hearing and a finding of serious and imminent threat to the administration of justice. And by its decision in this case the Circuit Court confirmed that Mr. Kunstler read its decision correctly. How then "Can we punish a lawyer for having believed the law to be as the circuit judge . . . had thought it was?" *In re Mason*, 203 W.W.2d 750, 759 (Kansas City Court of App., Mo., 1947). In *Mason* the circuit judge had been overruled; here Mr. Kunstler's view of the law was that of *Chase v. Robson*, which was the binding law of the forum and so confirmed by the Court of Appeals. If Mr. Kunstler should ultimately be proved to have been wrong, if *Chase v. Robson* should be overruled by this Court, Mr. Kunstler can hardly be faulted for believing it to be the law before it was overruled.

And aside from the question of intent, it is the law of the forum which determines whether misconduct, when brought to the trial court's attention, would warrant

disciplinary action. So when Respondent's counsel indicated to the Petitioner that he believed that the law of *Chase* governed his First Amendment right to freedom of speech absent a prior finding of the court (Tr. 88-89), he was accurately stating the law of the forum at the time and his reliance thereon. And if Petitioner seriously believed Mr. Kunstler was not correct in his view of the law of the forum, he had an obligation so to inform him and warn him how he intended to enforce the law in his court. There is no proof in the record that had he done so, Mr. Kunstler would have violated the court's proscription. It must be remembered that all comments attributed to Mr. Kunstler and upon which the April 2 order was based were made either on February 9 or before February 26 (the date of the *Time* article), at least five weeks before Mr. Kunstler had a hint that Petitioner's view of the law was different from *Chase v. Robson*.

Nor is the situation any different with respect to Mr. Kunstler's statements after April 1. As pointed out above, those statements are in no way relevant to the April 2 rulings; none of them involved a violation of Rule 27, since Mr. Kunstler avoided discussion of the case against Mr. Banks; and while Mr. Kunstler was critical of Petitioner, he was entirely free to make such criticism, absent proof of obstruction of the judicial process. *Infra*, p. 85 ff.

Thus, by no stretch of the imagination could discipline have been sustained against Mr. Kunstler. And if the facts do not sustain discipline against Mr. Kunstler, how can they sustain collateral consequences which hurt a wholly innocent third party? If Petitioner thought that Respondent's counsel was guilty of misconduct, he should have proceeded directly against Respondent's counsel—not against Respondent by denying him counsel

of his choice—observing all the careful requirements of procedural and substantive due process that this Court has said are necessary to protect the Constitutional rights of Respondent's counsel to practice law. He cannot avoid these requirements by punishing a client who is in no way at fault.

Petitioner argues that because Respondent was seeking the assistance of out-of-district counsel this somehow gives greater power to the court to make him suffer the denial of counsel of his choice. Reliance is placed on Standard 3.5 of the A.B.A. Project on Standards for Criminal Justice, *Standards Relating to the Function of the Trial Judge*, 1972 (pp. 20-21, Petitioner's brief). Of course, those standards may not and were not intended to modify the law with respect to *pro hac vice* admissions discussed above. Beyond that Petitioner seems to have overlooked a sentence in the standard quoted on page 21 of his brief reading as follows:

> "The trial judge should apply the law of the forum in determining whether the misconduct brought to his attention would warrant disciplinary action."

Chase v. Robson was the law of the forum. And even if Petitioner did not think so, the Circuit Court, by its action on the Petition for Mandamus, confirmed its view as to the binding effect of its opinion on this case. Thus, the District Court's action is a clear case where a court has attempted to apply an unforeseeable construction of law so as effectively to deny a person due process in the sense of "fair warning that his contemplated conduct" is impermissible. *Bouie v. City of Columbia*, 378 U.S. 347, 355 (1964).

Finally, it must be emphasized that there is absolutely nothing in this record from which it could be suggested that had Judge Holder, instead of barring him, stated to Mr. Kunstler that he viewed the law differently from the

way Mr. Kunstler did, that the latter would have done anything but litigate the issue. It is this fact that destroys any possible argument that Mr. Kunstler had to be barred from the court in order to enforce in the future the rules of the court as Petitioner saw the law.

V.

COURT RULE 27 IS NOT COMPATIBLE WITH THE FREEDOM OF EXPRESSION GUARANTEED BY THE FIRST AMENDMENT AND IS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Admitting that the First Amendment would preclude a prohibition leveled against statements like those in issue here if made by the press or other persons not counsel for parties to the litigation (Petitioner's brief, p. 23), Petitioner argues that various Constitutional limitations enunciated by this Court are not applicable to statements made by lawyers in relation to pending litigation. Petitioner argues that the single fact that a statement is made by a lawyer for a defendant in relation to pending litigation renders inapplicable the tests whether "the utterances in question are a serious and imminent threat to the administration of justice," *Craig v. Harney*, 331 U.S. 367, 373 (1947), or "that the substantive evil must be extremely serious and the degree of imminence extremely high before utterance can be punished," *Bridges v. California*, 314 U.S. 252, 263 (1941); *Pennekamp v. Florida*, 328 U.S. 331, 334 (1946); and that "to warrant a sanction '[t]he fires which [the expression] kindles must constitute an imminent, not merely a likely, threat to the administration of justice,' " *Wood v. Georgia*, 370 U.S. 375, 385 (1962) (quoting *Craig v. Harney*). Moreover, Petitioner contends that counsel's utterances may be proscribed by a blanket rule

adopted upon a standard for controlling speech which has long since been rejected and that the rule may be made applicable to every case without an individualized determination of necessity.

We proceed to an examination of a series of Constitutional deficiencies of Rule 27.

A. No rule proscribing a defense lawyer's extrajudicial statements may be applied to a case until there has been a finding that in the particular case such a proscription is necessary and justified upon some acceptable Constitutional standard which defines a serious and imminent threat to the administration of justice.

Central to every consideration of First Amendment issues is that government may not impose restrictions in that area unless there is a "compelling reason", *Cohen v. California*, 403 U.S. 15, 26 (1971), to protect a valid governmental interest and that when a restriction is imposed it not be "overbroad". *Gooding v. Wilson*, 405 U.S. 518 (1972); *Lewis v. New Orleans*, ____ U.S. ____, 39 L. ed. 2d 214 (1974). Moreover, the doctrine of least offensive alternative means requires that, before imposing any speech-restricting decree, the governmental agency imposing the restriction must "demonstrate that no alternative forms of regulation would combat [the danger] without infringing First Amendment rights." *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); see also, *Lovell v. Griffin*, 303 U.S. 444 (1937); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

And where the regulation of speech has aspects of prior restraint, as does any blanket *advance* prohibition of speech, the government "carries a heavy burden of

showing justification for the imposition of such restraint," *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); and see, *New York Times Co. v. United States*, 403 U.S. 713 (1971).

And this Court has always reserved to itself the ultimate authority and responsibility to review any claims that an intrusion into the field of free expression is justified on the basis of "compelling reason", and otherwise satisfies the requirements expressed above, whether the interference with speech is by legislative enactment (*Fiske v. Kansas*, 274 U.S. 380 [1927]) or judicial finding (*New York Times Co. v. Sullivan*, 376 U.S. 254, 285 [1964]). Similarly, the Court makes its own determination of overbreadth, *Plummer v. Illinois*, ____ U.S. ____, 38 L. ed. 2d 3 (1973).

The most decisive infirmity of Rule 27 is its blanket nature. And Petitioner expressly eschews any effort to round the sharp edges of the Rule by trying to read it as something other than a *per se* rule[30] and insisting (as he must to make it at all applicable to this case) that the authorities establish that the prohibition "contained in DR 7-107 and Rule 27 may be generally enforced without further showing of a likelihood that their violation in each individual case will seriously prejudice the administration of justice." Petitioner's brief, p. 32. Put most succinctly, Petitioner's argument is that:

> "It must be sufficient, if the objects of the Constitutional provisions which seek to guarantee impartial justice are to be achieved, that the rules governing attorney's conduct prohibit the *types* of statements which are *generally reasonably likely* to interfere with the fairness of trial." Petitioner's brief, p. 36; emphasis supplied.

We point out below that every other court which has considered the matter has disagreed with Petitioner and

[30]Mr. Justice Powell concurring in *Cason v. Ohio*, 409 U.S. 1053 (1972), and *Lewis v. New Orleans, supra*, 39 L. ed. 2d at 220.

even the Kaufman Committee obviously had its doubts about the validity of a blanket restraint. Consideration of the matter by this Court may indeed lead to a limiting interpretation. But at this point we proceed upon the position asserted by Petitioner and we put the following question:

Where is the factual foundation for the argument that there is a compelling necessity for a blanket prohibition against lawyers exercising their First Amendment rights with respect to *any* criminal case they may have?

At this point in the argument, the characteristic riposte is this Court's statement in *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966), quoted and underlined by Petitioner in his brief at p. 26, and more specifically the reference in that case to "rule and regulation":

> "The courts *must* take such steps by *rule and regulation* that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. *Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.*" (Emphasis supplied by Petitioner.)

But this Court never said it would sanction a blanket rule applicable to each and every case without a finding that it was necessary—and its use of the phrase "rule and regulation" did not authorize a sweeping away of repeated expressions of the need in the First Amendment area of "precise regulation" based upon a "compelling necessity", a demonstration that the employment of a lesser power would be inadequate, and an avoidance of "prior restraints". The "rule and regulation" referred to

in *Sheppard* could just as well be one like Rule 29, *supra*, p. 3, which requires an individualized determination of applicability rather than a blanket rule which requires no such individualized determination. Moreover, nothing in *Sheppard* suggested that a standard for regulating speech different from that heretofore followed by this Court should be the basis of any such rule or regulation.

But the argument is made that since we are dealing with First Amendment rights of an attorney and since, in the language of *Sheppard*, lawyers come "under the jurisdiction of the court," they are thereby subject to regulation by blanket order proscribing speech which would be permissible to outsiders and that a different set of standards regulates the speech of lawyers.

But lawyers are not "officers of the court" in the sense of being part of court personnel. *Cammer v. United States*, 350 U.S. 399 (1956). As the Court said in that case:

> "[A]n attorney [is] not an 'officer' within the ordinary meaning of that term. Certainly nothing that was said in *Ex parte Garland* or in any other case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks or judges. Unlike these officials, a lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word 'officer' as it has always been applied to lawyers conveys quite a different meaning from the word 'officer' as applied to people serving as officers within the conventional meaning of that term.
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> * * *
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> "As we pointed out in the *Nye Case*, the 1831 Act was promptly passed by the Congress after the impeachment proceedings against Judge Peck failed

by a senatorial vote of 22 to 21. Judge Peck had sent a lawyer to jail and had taken away his right to practice as punishment for an alleged contempt. The contempt consisted of published criticism of Judge Peck's opinion in a case in which the convicted lawyer had appeared as counsel; he was also counsel in other pending cases involving similar issues. Those directing the impeachment proceedings, who later brought about the passage of the 1831 Act, expressed deep concern lest lawyers continue to be subjected to summary trials by judges without the safeguards of juries and regular court procedure.

* * *

"Such statements by the same man who reported the 1831 Act to the House of Representatives [Congressman James Buchanan] almost immediately after Judge Peck's acquittal are completely inconsistent with a purpose to treat lawyers as 'officers of the court', subject to summary punishment."

And in *In re Griffiths*, 413 U.S. 717 (1973), the Court only last year repeated the foregoing and added:

"Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. Moreover, by virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country. Yet, they are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy," 413 U.S. at 729.

We recognize that to say that defense lawyers are or are not "officers of the court" does not necessarily answer the question as to whether their speech may be

regulated. It does, however, indicate that the standards of proscription of their speech, if any, must take account of their independence and that they are clearly not employees of the government—as is the prosecutor—whose speech is attributable to the government. Defense counsel is important to the administration of justice but from the moment the public begins to think that its attorneys are really part of the judicial machinery to the extent of representing the interests of the court rather than of their clients, then will we have destroyed the independence of the bar and its unique value in the American legal system "to preserve the kinds of trials that our system envisages." *In re McConnell*, 370 U.S. 230 (1962).

> "Against a 'hostile world' the accused, called to the bar of justice by his government, finds in his counsel a single voice on which he must be able to *rely with confidence* that his interests will be protected to the fullest extent consistent with the rules of procedure and the standards of professional conduct." A.B.A. *Standards Relating to the Prosecutive Function and the Defense Function*, p. 146; emphasis supplied.

Petitioner says that *Craig*, *Bridges*, *Pennekamp*, and *Wood* are all to be swept aside because none of the parties there involved was a lawyer. But in *Wood* it was a sheriff, a part of the law enforcement machinery, who was involved and the Court said that was irrelevant. Beyond that, the right of litigating lawyers to make public statements about cases in which they are involved was settled long before the four cases cited above. That is exactly what the impeachment of Judge Peck was about, as so aptly pointed out by this Court in *Cammer*, *supra*. The attorney in that case, who was in *continuing* litigation on the issue he was discussing, made a detailed argument in the public press about the merits of his case, arguing that Judge Peck was in error. Judge Peck claimed a power to hold him in contempt. While the impeach-

ment lost by one vote, Congress made sure this would never happen again by limiting the contempt power of the court to *actual obstruction* of the administration of justice, 28 U.S.C., Sec. 401, as this Court has recognized in a consistent series of decisions: *Holt v. Virginia*, 381 U.S. 131 (1965); *In re Little*, 404 U.S. 553 (1972); *In re McConnell*, 370 U.S. 230 (1961); *Ex parte Hudgings*, 249 U.S. 378 (1919).

Petitioner is arguing that because the speaker is an attorney his statement can be proscribed where similar statements of others could not. But under 18 U.S.C., Sec. 401, he could not be punished for contempt. Petitioner must therefore contend that though contempt is not available, discipline by the court short of contempt is available against an attorney who speaks but does not obstruct; or that somehow the situation changes because a court has constructed a "rule" upon which its decision was based.

Such an arugment flies in the face of the entire basis for the impeachment proceedings of Judge Peck and the enactment of 28 U.S.C., Sec. 401. Congress was not concerned with whether contempt or discipline was employed against an attorney; Congress wanted to put an end to the idea that a judge could prevent a lawyer from informing the public about his case and more particularly about the errors of a judge. Mr. (later President) James Buchanan, manager of Judge Peck's impeachment on the part of the House, hammered home at this thesis, as this Court emphasized in the portions of Mr. Buchanan's speech which it quoted.

The lesson of the Peck impeachment is that lawyers–yes, litigating lawyers–are free to talk about their cases. That point has been reiterated by this Court in its continued reminder of that milestone in American history. See, *Bridges v. California*, *supra*, 314 U.S. at 266; *Nye v. United States*, 313 U.S. 33, 45 (1941). And they

are free so to speak because, as this Court said, quoting Mr. Buchanan in the Peck impeachment:

> " 'I may be wrong, but I hold it to be the imperative duty of an attorney to protect the interests of his client *out of court* as well as in court. * * * The public have almost as deep an interest in the independence of the bar as of the bench.' " (Emphasis supplied.)

Mr. Buchanan's statement adopted by this Court is a recognition of the fact that lawyers have a role in society which may give particular value to their opinions as to the functioning of the judicial system. They are of course experts on the judicial system and generally speaking are likely to know more about a particular case than the public at large. And if the case deals with an unpopular subject, it is frequently only the attorney who is in a position to inform the public as to the abuses that may be underway and to mobilize support necessary to prevent a perversion of justice. To limit unduly the role of an attorney in discussing a particular case, even one in which he is then engaged, will seriously encroach upon the public's right to know.

In *In re Sawyer*, 360 U.S. 622 (1959), relied upon so heavily by Petitioner, this Court went out of its way to emphasize that a lawyer—even one involved in pending litigation—was entirely free to address the public and to be critical of the law, a prosecution, and even the manner in which a judge was handling a case. And such communication might well be made, as the Court pointed out, to a lay audience as well as to a professional one, because oftentimes it is popular criticism which effects changes in the law.

The interesting point about the *Sawyer* case is not only this Court's insistence on the freedom of lawyers in the midst of litigation—and in that case, a jury trial with an

unsequestered jury—to make public comment about a pending matter, but the further fact that the attorney in that case was not even charged with speech which obstructed the trial. Perhaps the reason for that was precisely the situation which we have here: "The speech was made . . . on the island of Hawaii, at Honokaa, a village some 182 miles from Honolulu [where the trial was then underway]." 360 U.S. 623. While the distance is twice the 95 miles we are dealing with, the point is the same.

Sawyer says unmistakeably:

> "We can conceive no ground whereby the pendency of litigation might be thought to make an attorney's out-of-court remarks more censurable, *other than that they might tend to obstruct the administration of justice.*" 360 U.S. at 636, emphasis added.

And Mr. Justice Stewart's concurring opinion makes the same point when he emphasizes that it had not been charged or found "that the petitioner attempted to obstruct or prejudice the due administration of justice by interfering with a fair trial" (*id.* at 647).

Sawyer and the congressional enactment following the impeachment proceeding against Judge Peck emphasize a defendant's right to get his story out to the public, even through his attorney, and the public's right to know may not be constricted except in the case of *a demonstrable showing of obstruction of the administration of justice.*

Petitioner presses the minority opinion of Mr. Justice Frankfurter in *In re Sawyer,* 360 U.S. 622, 647 (1959), as if it were the law and argues that it is applicable here because it was "concerned with a public challenge to the trial judge's integrity and impartiality." Certainly nothing that was said by Mr. Kunstler prior to April 1 approaches that even remotely. And, as explained above, the post-April 1 statements have nothing to do with Petitioner's

order of April 2. Aside from the fact that Mr. Kunstler's statements are well within the majority opinion of *In re Sawyer*, it is Mr. Kunstler, if anybody—certainly not the Respondent—who should be charged with consequences of those statements, if they are punishable. Besides, one would have thought that the opinions of this Court, in *Holt v. Virginia*, 381 U.S. 131 (1965), and *In re Little*, 404 U.S. 553 (1972), should once and for all time have settled that, even as to statements emanating from lawyers, the test is not "the vehemence of the language", *Craig v. Harney, supra*, 331 U.S. at 376, but whether there is obstruction.

A free and independent bar—free to exercise First Amendment rights—has unique values in the scheme of our system of law. We need not conclude that defense counsel are in all cases immune from control in respect to their speech if there is in fact serious and imminent threat to the administration of justice. However, the nature of the relationships between attorneys, clients, and the public, and the very important interests here involved certainly call for the kind of individualized determination which this Court required in *Cleveland Board of Education v. LaFleur*, ____ U.S. ____ , 39 L. ed. 2d 52 (1974); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 415 U.S. 645 (1972), in order to determine whether control of an attorney's speech is required to avoid a serious and imminent threat to the administration of justice.

Rule 27 in essence establishes an irrebuttable presumption that in any case, from the time of arrest until trial, any statement made for dissemination by any means of public communication by a litigating lawyer within specified categories of comment wheresoever made and however narrow the public exposure and notwithstanding the lawyer completely fails to achieve any publication of his expression, must be presumed to create "a reasonable

likelihood that dissemination of his statement will interfere with a fair trial or otherwise prejudice the due administration of justice."

If individualized determination is necessary to determine whether a pregnant teacher may teach, a college student has moved his residence, or an unwed father is fit to bring up his children, then it would certainly be required for a determination as to whether a defense lawyer may use his First Amendment rights.

Assuming that under some circumstances statements by defense counsel must be curbed because of a claimed "overriding interest" of the need to avoid obstruction of the judicial process, there is no way of avoiding an "individualized determination." Only by such a determination may it be resolved that in a particular case the fair trial interest in fact overrides the free press interest. Among the factors to be considered might be where the statement is to be made, to whom, how likely it is that the public communication will in fact reach a potential jury panel, whether the issue is of wide public interest independent of the guilt or innocence of the defendant, what the likelihood is of any publicity seriously interfering with the selection of a jury, how imminent the trial is, whether there are other means of assuring the court that a jury may be chosen which has not been affected by publicity, what proscriptions will simultaneously be imposed on law enforcement representatives?

And indeed every court which has actually dealt with the problem has in fact employed the process of individualized determination and the Kaufman Committee seemed to be veering strongly in that direction.

This is the consistent theme of the holdings of the Seventh Circuit in this case and in its earlier opinions in *Chase v. Robson* and *In re Oliver supra.* In the latter case an attorney had been disciplined for violating a certain "Policy Statement" promulgated by the United States

District Court for the Northern District of Illinois, reproduced in *In re Oliver*, 308 F. Supp. 1183 (N.D. Ill., 1970), which sought to bar all extrajudicial comments. In reversing the district court's reprimand and threat of disbarment for any future misconduct similar to that reprimanded, the Court of Appeals for the Seventh Circuit said of the "Policy Statement":

> "A blanket prohibition, such as the instant policy statement, against all comment in all cases whether tried before a judge or jury without regard to whether such comment is or even could be prejudicial to the fair administration of justice cannot stand without making a mockery of the free speech guaranty of the first amendment."

The Seventh Circuit in *Oliver* summarized its holding in *Chase v. Robson*, as follows:

> "[B]efore a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is 'a serious and imminent threat to the administration of justice.' [Citing *Craig v. Harney*, 331 U.S. 367, 373 (1947)].' *Chase* involved a challenge on first amendment grounds to an order entered in a pending criminal case which directed that the parties to the action and their counsel 'make or issue no statements, written or oral, either at a public meeting or occasion, or for public reporting or for dissemination in any fashion, regarding the jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses, or the rulings of the court.' *Id.* at 1060. Since *Chase* was a criminal case tried before a jury there was some support for the order in the recommendations of the Committee on the Opera-

tion of the Jury System of the Judicial Conference of the United States, 45 F.R.D. 391, 404-407 (1969). *But even in criminal cases tried before a jury, that committee limited its suggested prohibition against dissemination of information to situations where 'there is a reasonable likelihood that such dissemination will . . . prejudice the due administration of justice.' Id.*, at 404." 452 F.2d at 114; emphasis added.

The Court will note that the Seventh Circuit interprets the Kaufman Report as requiring a finding of "reasonable likelihood that such dissemination will . . . prejudice the due administration of justice" before its suggested prohibitions would be enforced. And the United States District Court for the Northern District of Illinois, in its opinion in *Chicago Council of Lawyers v. Bauer* (Exhibit A appended to Petitioner's brief) is of the same view; see appendix to Petitioner's brief, p. 1.[31] But, as noted above, Petitioner rejects all limiting construction.

If the Seventh Circuit is wrong in its limiting construction of Rule 27, there is internal evidence within the Kaufman Report indicating that that Committee had its doubts about the validity of a "blanket rule". In no other way can one explain its recommendation C(1) (45 F.R.D.

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[31]There may be a difference between the limiting approach of *Chase* and that of the *Chicago Council of Lawyers* case: *Chase* seems to limit the applicability of the rule until there has been a prior finding of a threat to the administration of justice; *Chicago Council* would seem to allow the rule to come into effect but would permit a defense that there was a "reasonable likelihood" there was not in the given case a threat to the administration of justice. The latter is in the direction of, but hardly approaches, the kind of qualification that saved the ordinance in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), which prohibited noises or diversions adjacent to a school while in session "which disturbs or tends to disturb the peace or good order of such school session."

409), "provision for Special Orders in Widely Publicized and Sensational Cases," which has become Rule 29 of the rules of the Indiana District Court, *supra*, p. 3.

This is the provision which is the basis for orders which have been issued in recent cases surrounding Watergate. Without indicating approval of any orders issued thereunder, it is clear that the procedure under Rule 29 at least permits the Court to determine whether a proscription is in fact necessary in a given case and, if so, to tailor it to the needs of the case.

And in *United States v. Tijerina*, 412 F. 2d 661 (10th Cir., 1969), the district court, even before the issuance of the Kaufman Committee Report, fashioned a rule *with the consent of both parties* to meet the needs that all parties must have felt appropriate in that case.

Blanket rules limiting First Amendment rights, the rule of *Gitlow* and *Whitney*, *infra*, were discarded by *Yates v. United States*, 354 U.S. 298 (1957), and finally laid completely to rest by *Brandenburg v. Ohio*, 395 U.S. 444 (1969). And see, *Hess v. Indiana*, ____ U.S. ____, 38 L. ed. 2d 303 (1973). And blanket rules restricting First Amendment rights lead to absurd results. As pressed by Petitioner, an attorney in a case may not express an opinion about the innocence of his client to a newspaper reporter in Baltimore, Maryland about a disorderly conduct case pending in Cleveland, Ohio! And the newspaper reporter could be on a high school journal, or attending a convention of political scientists conducting a seminar on the improper use of criminal procedures.

That is not very far different from the way Petitioner acted in this case. Based mostly on statements made 95 miles away and with absolutely no proof of publication in the community from which a jury will be chosen, the court excludes an attorney because of violation of a rule said to have been adopted to prevent statements as to

which there is "a reasonable likelihood" of interference with a fair trial or prejudicing the due administration of justice, and he did all of this under the guise of protecting defendant's rights!

This is the ultimate consequence of the kind of blanket, unsupported prohibitions of speech contained in Rule 27.

B. Even if some limitation of speech was found to be justified in this particular case, the proscriptions of Rule 27 are nevertheless invalid because the regulation is overbroad and the court has not adopted the least drastic means necessary for achieving its purpose.

There never was a finding that the within case was a "widely publicized or sensational case" (Rule 29, supra, p. 3), authorizing an order limiting extrajudicial statements, but even if there had been, the broad proscriptions set out in Rule 27 would nevertheless be invalid because "[t]he breadth of . . . abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). The court has also said that the limitations sought to be imposed must "involve judgments not [based on] broad classifications, especially those based on subject matter." *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 100-101 (1972).

In this case Petitioner urges a complete and absolute ban on speech by an attorney within the six categories of topics enumerated in Rule 27 (1)-(6). Petitioner's brief, p. 34. This regulation of speech or expresssion by attorneys in pending criminal cases is not limited in any way as to time or place or manner, but deals with speech in terms of content and the identity of the person

exercising rights of speech, precisely the kind of proscription which this Court rejected in *Mosley, supra.* It would be hard to conceive of a rule that more broadly stifles fundamental liberties than the generalized proscription of Rule 27 when the end of preventing the obstruction of justice could be more narrowly achieved by the entry of an order tailored to the particular needs of the case under local Rule 29 promulgated by Petitioner's own district court. In that way the court could not only determine whether there were sufficiently specific findings of fact to support proscription of speech at all, but also what specific proscriptions were required. As this Court has said: "Broad prophylactic rules in the area of expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *N.A.A.C.P. v. Button, supra,* 371 U.S. at 438.

All of these demands for limiting restrictions upon First Amendment freedoms were taken into account by the Court of Appeals for the Seventh Circuit in its opinion denying the Petition for Rehearing filed by Petitioner. The Seventh Circuit believed that Petitioner had not explicitly raised what it called the broader issue:

> ". . . the task of balancing in this type of situation, the interest of the prosecution in obtaining a fair trial and the inherent right of the court to protect the public's interest in the orderly and fair administration of justice, on the one hand, against the defendant's sixth amendment right to counsel of his own choosing." Petition for Writ of Certiorari, p. 46.

Despite that, and out of an abundance of caution in exercising its appellate and supervisory power over the actions of Petitioner, the Seventh Circuit considered that broader issue and concluded that:

"... before a trial court may properly limit the defendant's right to a chosen counsel, there must be sufficiently supported and specific findings of fact that the conduct of the defendant's attorney creates a serious and imminent threat of 'significant prejudice to the defendant himself' or of 'disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' *Magee v. Superior Court of City & County of San Francisco*, 8 Cal. 3rd 949, 506 P.2d 1023 (1973). See *Chase v. Robson*, 435 F.2d 1059 (7th Cir., 1970)." *Ibid.*

Finally, it reviewed the whole record which Respondent has tried so carefully to put before this Court and concluded:

"Because interference with the individual's choice of counsel should be kept to the necessary minimum, in each case the trial court must consider carefully whether a less drastic alternative, such as a narrow injuction limiting particular kinds of public statements, would suffice to protect the other interests at stake.

* * *

"The findings of respondent [Judge Holder] in this case clearly did not meet this standard. Our independent review of the record reveals that ... the evidence with respect to the statements which could be deemed improper would not support such a conclusion.

"Petition for rehearing is denied." *Id.* at 47.

As applied to this case, Rule 27 includes none of the limitations which might reduce its overbreadth, *e.g.*, no area limitations as to proscribed speech, limitations in terms of period of time before trial when speech might be proscribed, differentiation among types of audiences and types of communication, *e.g.*, schools, fundraising groups, radio and television, careful delineation of any

limitation so as to permit free discussion of prison conditions apart from the particular indictment, etc.

Rule 27's proscription in general terms of the expression of "any opinion as to the accused's guilt" is plainly overbroad and unnecessary. While it may technically not be so in a given case, most jurors would really not be affected by the news that a defendant's lawyer thought he was innocent. The main thrust of Rule 27 is paragraph 4 with respect to the revelation of anticipated testimony, some of which might prove to be inadmissible. Mr. Kunstler never in any statement discussed such matters.

Lastly, as applied to the instant case, there was obviously no consideration at all of the other techniques which are recognizably available to abort obstruction of a trial, *e.g.*, careful screening of jurors, sequestration, change of venue.

Any thoughtful reading of the rules and regulations in question in this case must lead to the conclusion that they are unconstitutional for overbreadth and a total failure to employ the least drastic alternative means to limit fundamental freedoms protected by the First Amendment, if some limitation is demonstrated to be necessary upon some acceptable standard. See, *United States v. Dickinson*, 465 F.2d 496, 508 (5th Cir., 1972).

C. Rule 27 is invalid because it is based on an impermissible standard for regulating speech.

Rule 27, consistent with the proposals of both the Reardon and Kaufman Committees, defines the standard upon which it has imposed restrictions of speech, namely, that "there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice."

The history of the struggle to give vitality to the First Amendment has been an abandonment of the language of the English Seditious Libel cases, which punished speech which had a "bad tendency". The majority opinions of this Court in *Whitney v. California*, 274 U.S. 357 (1927), and *Gitlow v. New York*, 268 U.S. 625 (1925), proceeded upon that approach, a view of the First Amendment long since rejected by this Court. The clear and present danger test enunciated by Mr. Justice Holmes in *Schenck v. United States*, 249 U.S. 47 (1919), however much it may have been adjusted in subsequent years, see *Dennis v. United States*, 341 U.S. 494 (1951), remains the guidepost applied by this Court to test the validity of governmental regulation of speech as a "working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished," *Bridges v. California*, *supra*, 314 U.S. at 263.

The importance of *Bridges* is that there this Court applied this standard to speech deemed to threaten the administration of justice and specifically held inapplicable a standard of restriction claimed to be based on English precedent, *i.e.*, speech "*tending* to obstruct the orderly and fair administration of justice in a pending case," *ibid.* And the reason for the rejection of that standard was plainly stated as being the adoption of the First Amendment which was designed to bar in this country types of proscriptions upon speech enforced in England, including speech which threatened the administration of justice. 314 U.S. 264-66.

Petitioner argues that "this test . . . is not applicable to statements by lawyers in relation to pending litigation." Somehow or other, the status of a speaker as a lawyer in a pending litigation is supposed to diminish the degree of protection afforded by the First Amendment. But what

authority does the Peititoner cite for the foregoing radical change in the applicable standards of controlling speech? Among them are included the Reardon and Kaufman Reports, both of which are singularly silent on this particular Constitutional shift; an opinion of the Court of Appeals for the Tenth Circuit in the case of *United States v. Tijerina*, 412 F.2d 661 (1969), which dealt with a gag order to which all parties consented; the opinion of this Court in *Sheppard*, which is absolutely silent on the question of the standard upon which the court may control speech;[32] the dissenting opinion of Mr. Justice Frankfurter in *In re Sawyer*, 360 U.S. 622 (1959), a case which did not deal with the question of the Constitutional standards for controlling speech. Additionally, Petitioner cites *State v. Van Duyne*, 43 N.J. 369, 204 A.2d 841 (1964), which did not consider the Constitutional question here discussed but merely interpreted former Canon 20 of the A.B.A.'s Canons of Professional Ethics in a case dealing with prejudicial statements by *prosecuting* attorneys; and, finally, the

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[32]What this Court did say in *Sheppard* about reasonable likelihood was:

> "[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration was something the judge should have raised *sua sponte* with counsel." *Sheppard, supra*, at 363.

We suggest that this locution of "reasonable likelihood" has been wrung from its original context by the Reardon Committee and every committee that followed it and used it in an attempt to muzzle lawyers and prevent them from performing their historic function not only of defending unpopular clients but also informing the public about the issues presented in a particular case. The "reasonable likelihood" to justify changing venue has, without explanation, become a "reasonable likelihood" to curb speech!

lower court's opinion in *Chicago Council of Lawyers v. Bauer*, a copy of which is appended to the Petitioner's brief, which on this point goes no further than to cite the same authorities mentioned by Petitioner and relegates the Seventh Circuit's opinions in *Chase* and *Oliver* to a single footnote.

The Reardon Committee, the Kaufman Committee, and the Petitioner all recognize that nothing has occurred to alter the applicability of the clear and present danger standard as to speech claimed to be threatening the administration of justice and as enunciated in *Bridges*, *Pennekamp*, and *Wood*. But it is urged nevertheless that one's status as an attorney in the midst of litigation somehow alters the standard upon which speech may be controlled.

We are not called upon to insist that the impact of speech of lawyers is necessarily on exactly the same level as speech by non-lawyers. Our point here is simply this, whether it be lawyers or non-lawyers who are speaking, the *standard* which controls the Constitutionality of a restriction remains that heretofore enunciated by the Court.

What are the grounds upon which it is claimed that a lawyer could be regulated on some different standard than others? Ultimately, it comes to a contention that a lawyer is so much part of the court's machinery as to be subject to control by his status as such. This is a proposition which, as we pointed out above, was rejected by Congress 140 years after the *Peck* case and so recognized in *Cammer v. United States*, *supra*, and again last year in *In re Griffiths*, *supra*.

Nothing that we have suggested here contends for a position that under no circumstances may the freedom of expression by lawyers be limited if there is in fact a sufficiently specific finding that supports a conclusion

that there is a clear and imminent threat to the fair administration of justice. Upon such a showing, which presumably would be a precondition to the issuance of a special order under Rule 29, an order might be entered that is narrowly enough drawn to afford the protection needed both for the fair administration of justice and the freedom of expression. This Court in *Bridges v. California, supra,* expressly rejected the English system of control over publication respecting criminal proceedings. There is no basis in any case in this Court upon which a partial departure from the *Bridges* rule can be justified so that litigating lawyers may be subjected to a different *Constitutional standard* than innumerable other persons who are in a position to speak about a case.

D. Restrictions upon defense counsel are a violation not only of the First Amendment, but of Due Process of Law, particularly where no comparable limitations are placed on law enforcement authorities.

We demonstrated above that speech may not be controlled solely because the speaker was a litigating lawyer. We believe the full reach of the argument is that a defense attorney may not, consistent with the due process rights *of the client*, be muzzled, unless of course there is an interference with the administration of justice.

The defendant did not choose to be prosecuted; and if the government prosecutes, it must abide by every one of the provisions of the Constitution from trial by jury to lawyers' exercise of First Amendment rights. Prosecutors' speech may be restricted because they are on a different footing from defense counsel. When prosecutors speak, they may be effecting a denial of due process of law. *Irvin v. Dowd*, 366 U.S. 717 (1961); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

But it is a remarkable *tour de force* which would take a problem created by publicity-seeking prosecutors and other publicity harmful to a defendant[33] and turn that into a regulation of defense counsel. And even as that is done, it is the prosecutor who is given the last word. The rule stops defense lawyers from exercising their First Amendment rights to express an opinion as to the innocence of a defendant, but of course the prosecutor has the last word: he obtains an indictment. Considering the fact that it is not uncommon, particularly in a widely publicized case, for the indictment to be reprinted in full in the press, the prosecutor is free in the public press to make his charge that an accused is guilty and the defendant's counsel must not utter a word to contradict that charge! Under Rule 27, the prosecutor having by indictment expressed his opinion that a defendant is guilty, defense counsel may not express a contrary opinion.

Police officers, witnesses, the guard whom Respondent is supposed to have attacked, perhaps even a union of correction officers, the warden—all these people may talk, accurately or inaccurately, with complete protection of the First Amendment, but only the lawyer must be silent. The full import of this discrimination is clearly revealed in this case. Exhibit D, the *Time* article, contains a full statement of the Director of the Bureau of Prisons affirming Respondent's guilt and this seems permissible (see *supra*, p. 7). But a brief comment by Mr. Kunstler, not even addressing itself to guilt or innocence, is cited in support of his exclusion as counsel for Respondent.

The Kaufman Committee was fully aware of this discrimination and it said:

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[33]General Commentary by Reardon Committee, *Standards Relating to Fair Trial and Free Press*, published by A.B.A., p. 24.

"The Committee also does not at this time recommend any judicially-imposed restrictions on the release of information by federal law enforcement agencies. The Committee is encouraged by the steps which have been taken by these agencies to set their own houses in order. It is confident that with their increased awareness of the seriousness of the problems posed by prejudicial publicity, these agencies will continue to adopt measures of self-regulation without the necessity of direct intervention by the courts." 45 F.R.D. 403.

What measures of self-regulation has the government adopted to prevent the Director of the Bureau of Prisons from telling the government's side of a specific indictment to a nationwide magazine? Nothing that Mr. Kunstler ever said approaches the degree of specificity of Mr. Carlson's statement.

Aside from all the considerations referred to above, Rule 27 cannot as a matter of Due Process be sustained unless comparable restrictions were placed upon all government personnel directly or indirectly related to the case.

VI.

RESPONDENT MAY NOT BE DENIED COUNSEL OF HIS CHOICE BECAUSE HIS ATTORNEY REQUESTED PERSONS TO ATTEND THE TRIAL AND MAKE SURE THAT EVERY COURT SESSION WAS FULLY ATTENDED.

One point made by Petitioner remains to be treated, and that is the suggestion made by Respondent's counsel, to an audience which had come to see a film written by Respondent, that they attend the trial and make sure that every court session was fully attended. Petitioner again (brief, p. 36) presents this Court with an amalgam of statements made both before and after the entry of his

oral order on April 1 and his written order of April 2 in support of his exercise of discretion on those dates. The alleged statements about picketing the court house and urging physical confrontation (with all their elisions, as pointed out above) were made by Mr. Kunstler after April 1! *Supra*, p. 72. And the statement in Petitioner's order that Mr. Kunstler had asked people to fill adjacent hallways finds absolutely no support in the record in any statement made by Mr. Kunstler.[34]

Apart then from the irrelevancy of some of the factual support for Petitioner's argument, there is the telling

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[34]Those statements are described in the written order by Petitioner in this fashion: "Among public statements in Terre Haute, Indiana, petitioning attorney sought and requested certain segments of the community to support the defendant's case by, *inter alia*, filling the spectator section of the courtroom *and the adjacent hallways* thereto which, if achieved, would be a serious impediment in the Court's ability to provide the proper judicial decorum which is conducive to a fair and impartial trial and may well act to intimidate and/or alienate a jury." Petition for Writ of Certiorari, p. 49, emphasis added.

A careful perusal of the record reveals that there is no document or admission in the record that Mr. Kunstler said anything about filling the hallways. The Petitioner said (Tr. 168) that his secretary advised him that Mrs. Lowdermilk, clerk of the court, told her that a reporter told her, that Mr. Kunstler said he wanted the hallways filled. Mr. Kunstler refused to acknowledge that (*ibid.*) as he had earlier refused to stipulate to other reports of what Mrs. Lowdermilk had supposedly said to Petitioner's secretary (*id.* at 166-67) and neither the reporter, Mrs. Lowdermilk, or the Judge's secretary testified. Yet out of this triple hearsay developed by the Petitioner—not even the U.S. Attorney—the court made a finding.

This, we submit, puts in perspective the proof of the chamber of imaginary horrors conjured up in argument from this simple suggestion or request to an audience of high school students (not qualified for jury selection and most of whom were out-of-state students) to give full effect to the Constitutional guarantee of a public trial.

admission that "[N]either the Code of Professional Responsibility nor any Rule of Court in precise words prohibits an attorney from engaging in conduct of this sort. . . ." Petitioner's brief, p. 37. Despite this admission, Petitioner argues that this was an incitement of demonstrations to attempt to influence judges and juries that would seriously prejudice the fair and lawful administration of justice. This would be so, the argument continues, even if it be presumed that the demonstrations would be peaceful. It is so clear as not to require the citation of authorities that this Court has repeatedly protected concededly peaceful demonstrations. Nothing in any utterance urged by Petitioner in support of his argument suggests that Respondent's counsel was suggesting or requesting demonstrations at or around the court house.

What Petitioner labels "outside influence" (brief, p. 37) and "extraneous factors [brought] to bear on a judge and jury . . . [in] an effort to subvert the foundation of the judicial process" (*ibid.*), might more accurately be characterized as a call to young citizens to give substance and reality to the Constitution's guarantee of a public trial to one accused of crime. Public concern and attendance at trial will, of course, be no panacea for abuses of authority and discretion, but it may enable the public to see that the defendant "is fairly dealt with and not unjustly condemned, and . . . may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . ." 1 Cooley, *Constitutional Limitations* 647 (8th ed., 1927). Neither Respondent nor his counsel argue that he has more Constitutional rights because Respondent is a Black man who has been indicted and is to be tried while serving a previous sentence; but he does not deserve less because of those same facts.

The generality of the remarks made by Respondent's counsel is highlighted by Petitioner's admission that the remarks "are not specific as to time or place or content or noisiness or orderliness, except for his specific plea for filling the courtroom with sympathizers." Petitioner's brief, p. 38. But based upon this statement, this Court is urged to withhold Constitutional protection to Respondent's counsel to make such a statement. For the proper penalty for the statement, Petitioner argues, is to deprive the Respondent of the counsel of his choice, and his attorney of the right to represent Respondent. To support this argument Petitioner urges *Cox v. Louisiana*, No. 2, 379 U.S. 559 (1965), as the case that bears the closest analogy to this case. In that case, as Petitioner admits, this Court relied on the specificity of a narrowly drafted Louisiana criminal statute. Then, too, in *Cox* there was picketing and parading by a group of 2,000 students which was not speech in its pristine form but conduct of a totally different character. It dealt not with pure speech, but speech plus. In no way does *Cox* support the consequent restrictions imposed upon pure speech in this case. Were it otherwise, Respondent's counsel could never tell young high school students what this Court has taught, that

> "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 270 (1948).

Similarly, they might never be informed that far from being considered "outside influences" or "extraneous factors [brought] to bear on judge and jury . . . [in] an effort to subvert the foundation of the judicial process," they had every right to fill the courtroom, and that as this Court has said "without exception all courts have

held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." *In re Oliver, supra*, 333 U.S. at 271-72.

VII.

DEFENDANT HAS BEEN DENIED A RIGHT TO A SPEEDY TRIAL AND IS ENTITLED TO HAVE THE INDICTMENT DISMISSED.

In a line of decisions by this Court developing the dimensions of the Constitutional right to a speedy trial, it has by now been clearly established that speedy trial is included within the rights deemed to be fundamental and thus secured by the Sixth Amendment. This Court's opinion in *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967), states: "The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution." *Id.* at 226.

It is, of course, true that this Court has said that dismissal of an indictment for a denial of speedy trial is a severe remedy. *Barker v. Wingo*, 407 U.S. 514, 522 (1972). But while *Barker* set down various factors which should be considered in determining whether on balance the delay is more attributable to the prosecution or defense, this Court in *Barker* "did not deal with the remedy for denial of this right." *Strunk v. United States*, 412 U.S. 434 (1973). *Strunk* conceded, however, "that the stress from delayed trial may be less on a prisoner already confined, whose family ties and employment have been interrupted, but other factors such as the prospect of rehabilitation may also be affected adversely."

So this Court addressed itself to the remedies available once a *de facto* denial of speedy trial had been established.

On the subject of "dismissal of the indictment for a finding of a *de facto* denial of the right to speedy trial," this Court said in *Strunk* that "such severe remedies are not unique in the application of constitutional standards." *Ibid.* These principles were reaffirmed and strengthened in *Moore v. Arizona*, ____ U.S. ____, 38 L. ed. 2d 183 (1973), where this Court dealt with the possible prejudice to one incarcerated:

> "Moreover, prejudice to a defendant caused by delay in bringing him to trial is not confined to his defense in those proceedings. Inordinate delay, wholly aside from possible prejudice to a defense on the merits, may "seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States v. Marion*, 404 U.S. 307, 320 (1971). These factors are more serious for some than for others, but they are inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty.' 407 U.S., at 537 (White, J., concurring); see also *id.*, at 532-533 (majority opinion).
>
> "Some of these factors may carry quite different weight where a defendant is incarcerated after conviction in another State, but no court should overlook the possible impact pending charges might have on his prospects for parole and meaningful rehabilitation. *Strunk v. United States*, 412 U.S. 434, 439 (1973)." *Id.* at 186; footnote omitted.

All these principles seem particularly apropos in this case.

Whatever may be the state of the record in the almost incredible confusion up to the time of the Seventh Circuit's granting of the Writ of Mandamus in this case on May 17, 1973, it was clear thereafter that Respondent

wished to go forward to trial with counsel of his choice on an indictment returned almost four months after an assault alleged to have taken place almost ten months prior to the granting of the Writ. After the Circuit Court stayed the effectiveness of its grant to consider a Petition for Rehearing, Respondent filed a request for, *inter alia*, an immediate trial. Motion in Opposition to the Petition for Rehearing, pp. 2-4; and see, Petitioner's Response to Petition for Rehearing and Reply to A.B.A.'s Brief *Amicus Curiae*, pp. 13-14. And that this Court realized that issue was still in this case can be seen in the order entered by this Court, per Rehnquist, J., on October 5, 1973.

The defendant's interest in a speedy trial with counsel of his choice should have been given greater weight both by the Circuit Court and this Court upon consideration of applications for stays. This may indeed be a situtation where the appellate process, particularly if buttressed by stays, produces the very evil which the Constitutional right of speedy trial was designed to overcome. But each of these stays was on application of the government and should stand on no different footing than any other reason for the government's not proceeding with a case. Particularly is this so where one of the grounds asserted by Petitioner for his denial of Respondent's desire to be represented by Mr. Kunstler was the Petitioner's concern for a speedy trial for the benefit of Respondent.

CONCLUSION

The twin themes that emerge from this intense litigation vividly reflect a struggle on the part of the Respondent, on the one hand, to secure his Constitutional right under the Sixth Amendment to counsel of his choice and, on the other hand, a claim that the case presents a confrontation between protection of the

judiciary and freedom of the press, cast in recent years in terms of the Fair Trial-Free Press issue. On both of these questions, a rich and instructive history provides wise guidance for this Court's resolution of the case.

Respondent, a young and creative artist, has dedicated his talent to communicating to his fellow citizens the richness, the eloquence and the profundity of Frederick Douglass, a great Black American and one of the noblest statesmen in the history of our nation. Understandably, Respondent's view of the workings of the judicial machinery has been affected by the words of his mentor whom he quoted as follows in his own dramatization:

> "It is a real calamity in this country, for any man, guilty or not guilty, to be accused of crime, but it is an incomparably greater calamity for any colored man to be so accused. Justice is often painted with bandaged eyes. She is described in forensic eloquence as utterly blinded to wealth or poverty, high or low, white or black, but a mask of iron, however thick, could never blind American justice when a black man happens to be on trial. Here, even more than elsewhere, he will find all presumptions of law and evidence against him. It is not so much the business of his enemies to prove him guilty, as it is the business of himself to prove his innocence.
>
> * * *
>
> "The country in which we live is happily governed by ideas as well as laws, and no black man need despair while there is an audible and earnest assertion of justice and right on his behalf."[35]

---

[35]Frederick Douglass speaking on the occasion of the 21st Anniversary of Emancipation in the District of Columbia, April 16, 1883, in the Congregational Church, Washington, D.C.

Foner, "The Life and Writings of Frederick Douglass," Vol. IV, pp. 357-358.

Faced with prosecution, Respondent sought out an "audible and earnest assertion of justice and right on his behalf" and was determined to have as his attorney a man who made his mark by spending himself without measure in an effort to secure civil rights for Blacks in the South. William M. Kunstler's efforts could not have gone unnoticed by Respondent, despite the fact that he was only seven years old when Martin Luther King, Jr. was leading the Montgomery Bus Boycott. For it was that same leader of the Southern Christian Leadership Conference who turned to out-of-state lawyers when he was prosecuted by Alabama authorities, and who authored a foreword to Mr. Kunstler's book, *Deep in My Heart*, which included the following comment:

> "As we have fought and demanded our just rights, as we have given witness with our bodies to the existence of evil, lawyers have steadfastly used their professional talents, knowledge and abilities to aid us, to make our plea for dignity heard in the courts of our land." Kunstler, *Deep in My Heart*, William Morrow & Co., Inc., 1966, p. xxii.

Petitioner's understandable plea to be represented by Mr. Kunstler is within his Constitutional right.

With regard to the second theme of Fair Trial-Free Press, the words spoken by the then Representative (later President) James Buchanan in the impeachment trial of Judge James H. Peck before the Senate of the United States still echo their warning through the years:

> "The people of this country love their judiciary well; but they love the freedom of their press still better; and if these two great branches of our civil policy shall be placed in hostile array against each other by the decision of this Senate, God only

knows what may be the consequences." Stansbury, *Report of the Trial of James H. Peck* (1883), 475.

Congressman Buchanan spoke more than 140 years ago; long before this Court rendered a series of decisions in which it has prevented other branches of the government from violating the First Amendment rights of the American people despite the strongest pleas that exceptional situations merited departure from that cornerstone of freedom. See, *New York Times Co. v. Sullivan*, *supra*, 376 U.S. 254 (1971); *Terminiello v. Chicago*, 357 U.S. 1 (1949). Mr. Buchanan's words about the "love" of "the people of this country" for freedom of the press are even more compelling today, when the value of the full availability to the people, through the press, of facts as to the working of their government is daily confirmed.

Dated: April 3, 1974.

Respectfully submitted.

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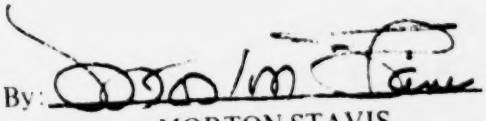
DORIS PETERSON

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of this Court, hereby certifies that on this 3rd day of April, 1974, I served a copy of the foregoing Brief of Respondent on counsel for Petitioner, by certified mail, return receipt requested, addressed to the following:

Norman P. Rowe, Esq.
810 Fletcher Trust Building
Indianapolis, Indiana 46204

By: 
MORTON STAVIS

APPENDIX A

EXHIBIT A

SUNDAY, FEBRUARY 18, 1973 — THE INDIANAPOLIS STA

Kunstler To Defend Inmate In Beating

By JOHN M. BANCROFT

William Kunstler, attorney for such controversial defendants as the Chicago 7 and H. Rap Brown, was in Indianapolis last night to raise funds for the defense of his newest client, an inmate of the Federal Penitentiary at Terre Haute.

The client is Arthur C. Banks, 25, a New York actor and playwright sentenced in 1971 to a five-year prison term for draft evasion.

Banks, who legally changed his name to Burghardt for his stage roles, has now been indicted for assaulting a guard at the Terre Haute prison last Aug. 22. The case is expected to come to trial in May.

KUNSTLER and his client claim that it was Banks who was assaulted by prison guards after he and a group of nearly 200 fellow Negro inmates protested the beating of another Negro inmate last August.

The charge against Banks, Kunstler said, "is purely retaliative . . . a cheap little way of getting back at him for being a troublemaker.

"I'm certain he was brutalized by the guards," Kunstler said. "It's a common cover-up tactic. In order to protect themselves, they filed charges against him."

"THIS IS GOING to be a much more difficult defense than that of the Chicago 7 or of the Berrigans. In those cases, we were dealing with fabricated conspiracies and that fact was obvious.

"Here, there are no Perry Mason tricks to be pulled to prove that Banks didn't strike the guard.

"Here, all the evidence is inside prison walls, under the control of the authorities who brought the charges against him," Kunstler said. "And the word of a guard is always taken over that of an inmate."

Banks was transferred from the Danbury (Conn.) Federal Correction Institute after spending five months "in the hole" there for his part in a sit-in protest.

"Arthur got into all this trouble," Kunstler said, "because he doesn't act like most of the black inmates who (Uncle) Tom it inside.

"There's a lot of antagonism against him, too, because his wife is white," he said.

DENISE SPALDING, Banks' wife, is a social worker involved in a prison arts program in New York city and state prisons.

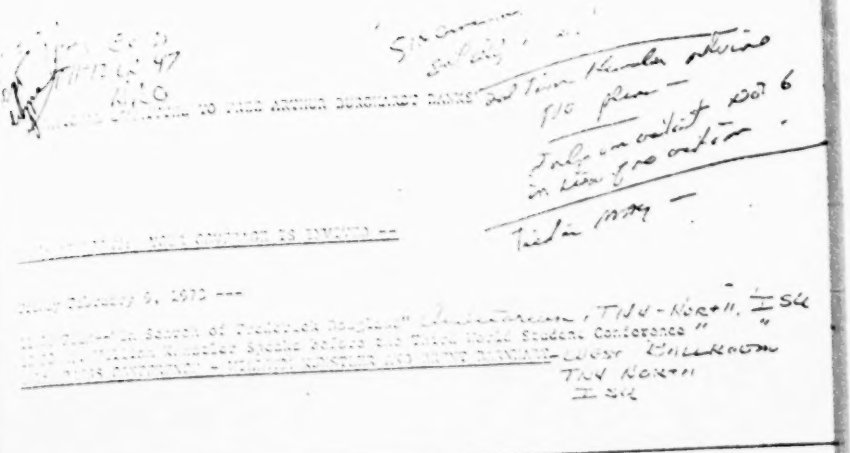
Her interest in prisons and in the plight of these incarcerated there predates her husband's conviction. She was raised on the prison farm where her father was employed and her brothers are now prison guards on the West Coast.

"Arthur's indictment follows a very clear pattern," she said. "It is an example of the technique used by the government to quiet radicals, usually those who are big, black and articulate."

Earlier yesterday, Kunstler urged those attending the Third World Student Conference at Indiana State University at Terre Haute to organize demonstration in support of Banks and to fill the courtroom with sympathetic spectators during the trial in Terre Haute.

"Anything they can do to draw attention to the trial will be welcomed," he said. "I'm not asking them to blow up the courthouse, but that would certainly draw attention."

EXHIBIT B



HEADING PRINTED TWICE DUE TO ILLEGIBILITY OF ORIGINAL COPY

THE NATIONAL COMMITTEE TO FREE ARTHUR BURGHARDT BANKS

PRESS ADVISORY: YOUR COVERAGE IS INVITED—

Friday February 9, 1973—

12:00 Film—"In Search of Frederick Douglass"
12:30 Mr. William Kunstler Speaks before the Third World Student Conference
1:15 PRESS CONFERENCE—WILLIAM KUNSTLER AND BRENT BARNHART

Mr. William Kunstler will arrive in Terre Haute to speak before the Third World Student Conference at Indiana State University, about a Black inmate, Mr. Arthur Burghardt Banks, currently in solitary confinement at the Terre Haute Federal Penitentiary, who was

arraigned February 2nd on charges of assualting a federal officer. Mr. Kunstler is defending Mr. Arthur Burghardt Banks in association with Mr. Brent Barnhart of Indianapolis.

Mr. Burghardt Banks, a noted actor and playwright, is serving a five year sentence for refusing induction into the armed forces. The new charges, which could result in an additional five year sentence, stemmed from an incident in which Mr. Burghardt Banks was severely beaten by a number of correctional officers. Mr. Burghardt Banks has been in solitary confinement since the 22nd of August, the date of the incident. (See attachment)

While in Terre Haute consulting with his client, Mr. Kunstler will speak at several locations in the Terre Haute area to familiarize the community with the nature and facts of the case, and to raise funds for Mr. Burghardt Banks' defense.

"I am proud to be associated with Mr. Burghardt Banks, as he represents the finest of the pacificist anti-war movement. He is a Black man who sent to jail for his beliefs in the value of human life and the dignity of all people, at a time when many who had much more to defend chose alternatives to incarceration," said Mr. Kunstler.

Before his incarceration Mr. Burghardt Banks starred in a film depicting the life of Frederick Douglass, the Black statesman, historian and orator of the late 19th Century, which has been shown on National Education Television's Black Journal. The film, "The Sear for Frederick Douglass" interweaves the speeches of Douglass and conversations with Burghardt. Shortly before his imprisonment Mr. Burghardt Banks appeared in two New York theaters in a one-man play adaped by him from Douglass' original

works. The film evokes the spirit of the great freedom fighter, Mr. Douglass, his relevance to all Black people today, and his special meaningfullness to Mr. Burghardt Banks. The play was done at a major Off-Broadway theatre last spring.

Mr. Kunstler sees this indictment as "a political attack by the prison administration on an individual who firmly stands for his beliefs, who is articulate and a spokesman for Black Liberation and Pacificism, and therefore a threat to the smoothe-running oppression that is so much a part of prison life in this country today. This case typifies the strategy used to quiet dissent among inmates, for the case is such that due process is virtually an impossibility."

FOR MORE INFORMATION CONTACT:

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ISU
(812) 232-6311 extension 2804

Denise Spalding
Committee to Free Arthur Burghardt Banks
P.O. Box 101
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(212) 595-5963 or (212) 873-2636

NOTE: The within Exhibit is attached in the same form as it appears in the court's file. The handwriting in the upper right hand corner of the first page is not recognized by Respondent as being one he is familiar with.

EXHIBIT C

FAMED DEFENSE ATTORNEY WILLIAM KUNSTLER CAME TO TERRE HAUTE TODAY TO SPEAK TO THE THIRD WORLD STUDENT ORGANIZATION . . THE BLACK DIVISION OF THE NATIONAL STUDENT ASSOCIATION . . KUNTSLER GAINED WORLD FAME AS DEFENSE ATTORNEY FOR THE CHICAGO SEVEN . . HE SPOKE ON BEHALF OF HIS NEW CLIENT . . BLACK ACTOR PLAYWRIGHT ARTHUR BURGHARDT BANKS . . AN INMATE AT THE TERRE HAUTE FEDERAL PENITENTIARY WHO IS SERVING A FIVE YEAR TERM FOR DRAFT EVASION . . BANKS WILL GO ON TRIAL THIS SPRING IN TERRE HAUTE FEDERAL COURT ON CHARGES OF ASSAULTING A GUARD. KUNTSLER TOLD THE GATHERING OF STUDENTS AND NEWS MEN THAT THE ONLY SUCCESSFUL WAY TO DEFEND YOUR SELF AGAINST CHARGES SUCH AS THOSE FACING BANKS IS BY CREATING A COMPLETE SUPPORT GROUP AROUND THE TRIAL THAT INCLUDES DEMONSTRATIONS . . MAKING SURE EVERY COURT SESSION HAS A FULL HOUSE AND LISTING CELEBRITIES WHO ARE INTERESTED IN THE CASE . . AND KUNTSLER HAD A COMMENT CONCERNING DRAFT EVADERS AND THE GRANTING OF AMNESTY . . . . . .

. . . . . .

SOF . . . . . 1:01 . . .

EC . . IN MY CRAW . .

. . . . . .

EXHIBIT D

TIME

THE NATION

Changing the Guard

PROTEST

"They Are Killing Me"

BURGHARDT AS FREDERICK DOUGLASS
Like a Roman candle

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73–841

Cale J. Holder, United States District Judge for the Southern District of Indiana, Petitioner, *v.* Arthur Banks.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May 28, 1974]

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MR. JUSTICE POWELL took no part in the consideration or decision of the case.